

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

In The United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 15, 102

524

HENRY WILSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED MAY 15 1959

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 15,102

HENRY WILSON,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

CRIMINAL DOCKET

CASE CLOSED

PARTIES - United States vs. Henry Wilson; **ATTORNEYS** - U. S. Attorney - Burka, C. McCool - 704 17th St., N. W., E. Roberson - 5020 Wash. Pl, NE; **G.J. NO.** - 1487-57; **CRIMINAL NO.** 1200-57; **CHARGE-VIO.** 22, DCC, 3501a

DATE

PROCEEDINGS

1957 Dec 16	Presentment and Indictment filed (1 Count); Copy of indictment given to deft. Cert. filed.
1957 Dec 17	Affidavit for leave to proceed without prepayment of costs GRANTED and filed., TAMM, J.
1957 Dec 17	ORDER APPOINTING Cornelius McCool as counsel to defend, filed. TAMM, J. (N)
1957 Dec 18	ORDER VACATING APPOINTMENT of Cornelius McCool and APPOINTING Eugene Roberson as counsel to defend, filed. TAMM, J. (N)

1957 Dec 18 APPEARANCE of Eugene Roberson entered.

1957 Dec 20 ARRAIGNED, Plea NOT GUILTY entered; Deft. REMANDED to the District of Columbia Jail; Attorney Eugene Roberson present. TAMM, J. (Reporter-Hoffmann) Cert. filed.

1958 Jan 21 Affidavit of Defendant in support of motion for issuance of subpoena, filed. MOTION OF DEFENDANT for issuance of subpoena, filed and GRANTED (Fiat) LAWS, C.J.

1958 Feb 4 JURORS FROM CRIMINAL COURT NO. 4 SWORN ON VOIR DIRE; JURY AND TWO ALTERNATE JURORS SWORN:
 Bernard H. Arendes, Margaret B. Arendes, Augusta Bauman, Eldridge K. Birch, Julia Boyd, Arthur Brown, Louis J. Dembo, Martha W. Eddy, Esther W. Fauntleroy, Suzanne H. Finn, Robert M. Geer, Frederick J. Gleason.
 a. 1. Steward Henderson a. 2. Curtis W. Johnson
 TRIAL BEGUN: Court Orders food for jury; VERDICT: Guilty as indicted; Case is REFERRED to the Probation Officer of the Court; Defendant is REMANDED to the District of Columbia Jail; Attorney Eugene Roberson present. CURRAN, J. (Reporter-P. Mallon) Cert. filed.

1958 Apr 17 SENTENCED to imprisonment for a period of ONE (1) YEAR to FOUR (4) YEARS. Defendant REMANDED to the District of Columbia Jail; Attorney Eugene Roberson present. CURRAN, J. (Reporter - Gore)

1958 Apr 21 Judgment & Commitment of 4-17-58, filed. CURRAN, J.

1958 Apr 23 Motion of deft. to vacate and set aside sentence, pursuant to Sec. 2255, T 28, U. S. C., filed (Prepared by deft.)

1958 Apr 30 Government's opposition to Deft's. motion to vacate sentence pursuant to T. 28, U. S. Code, Sec. 2255, filed.

1958 Apr 30 DENIAL of motion of Deft. to vacate sentence under 28, U. S. Code, Sec. 2255, filed. The motion, files and records conclusively show that the Defendant is entitled to no relief. CURRAN, J. (N)

- 1958 Jun 26 MOTION of DEFENDANT to vacate sentence and discharge Deft. or in the alternative grant a new trial under T. 28, U. S. Code, Sec. 2255, filed. (Prepared by Deft.)
- 1958 Aug 19 MOTION of DEFENDANT to vacate sentence and discharge defendant or in the alternative, grant a new trial filed 6-26-58 DENIED (Fiat) CURRAN, J. (N)
- 1958 Sep 2 AFFIDAVIT in support of application for leave to proceed on appeal - denial of 8-19-58 of motion to vacate sentence without prepayment of costs, filed. (Prepared by Deft.)
- 1958 Oct 1 DENIAL of application for leave to proceed on appeal from denial of 8-19-58 of motion to vacate sentence filed - Not taken in good faith. CURRAN, J. (N)
- 1958 Dec 22 TRANSCRIPT OF PROCEEDINGS, April 17, 1958, Pages 1-2, filed. Clerk's Copy (Reporter-Gore)
- 1959 Jan 27 Certified copy of Order from the U. S. Court of Appeals ORDERING that the Clerk is directed to file Government's opposition forthwith, and FURTHER ORDERING that the Deft. is ALLOWED to proceed in forma pauperis to the extent of having the stenographic transcript of petitioner's trial prepared at the expense of the United States, filed. Jan. 23, 1959.
- 1959 Feb 25 TRANSCRIPT of PROCEEDINGS, Pages 1 thru 61, Feb. 4, 1958, filed. Clerk's Copy (Reporter-Mallon)
- 1959 Mar 31 Certified copy of Order from the U. S. Court of Appeals EXTENDING TIME within which the petitioner may docket the record on appeal to May 10, 1959, filed.
- 1959 Apr 22 Certified copy of Order of the U. S. Court of Appeals allowing deft. leave to appeal from the judgment of the District Court without prepayment of costs, and that the joint appendix shall be prepared at the expense of the United States, filed. APPEAL NOTED.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled October 31, 1957, Sworn in on November 5, 1957

The United States of America	:	Criminal No. 1200-57
v.	:	Grand Jury No. 1487-57
Henry Wilson	:	Vio. 22 D.C.C. 3501a

The Grand Jury charges:

On or about November 14, 1957, within the District of Columbia, Henry Wilson did take immoral, improper and indecent liberties with Clara R. Gardner, a female child under sixteen years of age, that is, about eleven years of age, with the intent of arousing, appealing to and gratifying the lust, passions and sexual desires of the said Henry Wilson.

A TRUE BILL:

/s/ _____
Foreman

/s/ OLIVER GASCH

Attorney of the United States in
and for the District of Columbia

[Filed December 20, 1957]

PLEA OF DEFENDANT

On this 20th day of Dec., 1957, the defendant Henry Wilson, appearing in proper person and by his attorney Eugene Roberson, being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads not guilty thereto.

Deft. remanded to the D. C. JAIL.

Present:

United States Attorney

By A. Burka

Assistant United States Attorney

D. Hoffman
Official Reporter

By direction of

EDWARD A. TAMM

Presiding Judge
Criminal Court # 3

HARRY M. HULL, Clerk

By _____
Deputy Clerk

[Filed February 25, 1959]

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EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

* * * * *

UNITED STATES OF AMERICA)

versus)

HENRY WILSON)

Criminal Case No. 1200-57

Washington, D. C.

February 4, 1958

The above-entitled matter came on for hearing before the HONORABLE
EDWARD M. CURRAN, a United States District Judge, at 10:00 A. M.

APPEARANCES:

For the Government: Alfred Burka, Esquire

For the Defendant: Eugene Roberson, Esquire

* * * * *

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OPENING STATEMENTS:

MR. BURKA: May it please the Court and ladies and gentlemen of the jury,
as stated to you a few minutes ago, the defendant in this case is Henry Wilson,
who is charged with committing an indecent act upon a minor child, Clara Lee
Gardner, who is eleven years of age.

The Government will present evidence to you that on or about November 14
of this year in the District of Columbia that Henry Wilson, in the words of the
indictment, took immoral liberties and indecent liberties with Clara Gardner,
a child under the age of sixteen years, to be exact eleven years of age, with the
intent of arousing, appealing to, and gratifying his lusts and passions and sexual
desires.

The Government will present testimony of witnesses to show that the defend-
ant asked his wife and the young girl, whom we will call a complaining witness,
to get into bed with him, one on each side of him. Then he sent his wife down to
get some coffee and committed an indecent act on Clara Gardner while she was
gone.

4

The defendant's wife came back and saw the defendant in bed on top of the
young girl and she went out and called the police. When the police arrived the

defendant was still in bed, partially clothed, and the little girl was putting a cover over her.

At the conclusion of this case, if we have proven each and every element of the offense, as set forth to you by His Honor, Judge Curran, the Government will ask you to return a verdict of guilty as charged.

MR. ROBERSON: Your Honor, ladies and gentlemen of the jury, it is our hope that we can supply the things that have been left out by the Government in presenting its case. It is our hope that every one will tell the truth, both the complaining witness, the aunt, the officers, and the defendant.

If the truth is told, you will understand why this incident occurred and I am sure your verdict will be favorable to the defendant.

* * * * *

CLARA LEE GARDNER

was called as a witness on behalf of the Government and, after preliminary examination on the stand, was sworn, examined, and testified as follows:

DIRECT EXAMINATION

BY MR. BURKA:

5 Q. Clara Lee, would you tell us your full name and address? A. Clara Lee Gardner, 1744 Hobart Street, Northwest.

Q. How old are you? A. Eleven.

Q. What grade are you in at school? A. Sixth grade.

Q. And where do you go to school? A. H. D. Cook.

Q. Now, Clara, do you go to church? A. Yes, sir.

Q. Do you go to Sunday School? A. Yes, sir.

Q. How long have you been going to church and Sunday School? A. Mostly every Sunday.

Q. Do you know the difference between telling the truth and telling a lie?

A. Yes, sir.

Q. Do you know what happens to children that do not tell the truth? A. Yes, sir.

Q. Would you tell us what you think happens to them? A. Children?

6 Q. Yes, who do not tell the truth? A. Yes, send them to the reformatory school.

MR. ROBERSON: What?

THE COURT: They go to the reformatory school she said.

MR. BURKA: You will have to keep your voice up a little louder.

Q. Do you know Henry Wilson? A. Yes, sir.

Q. And is he related to you? A. Yes, sir.

Q. How is he related to you? A. He is my uncle.

MR. BURKA: Would you speak a little louder, Clara?

THE WITNESS: He is my uncle.

Q. And would you tell any lies about your uncle? A. No, sir.

Q. Would you tell any lies about anyone? A. No, sir.

Q. Or about anything? A. No, sir.

THE COURT: Do you know you have to raise your right hand, Clara? Is that your name, Clara?

THE WITNESS: Yes, sir.

THE COURT: And you have to swear to God that you will tell the truth when you put your hand up and the clerk administers the oath to you. You are calling
7 upon God that you are going to tell the truth?

THE WITNESS: Yes, sir.

THE COURT: Stand up then and raise your right hand.

(The witness stood up and the clerk administered the oath.)

BY MR. BURKA:

Q. Now, Clara, keeping your voice up even if you almost have to shout, so His Honor, the jury, and all of the ladies and gentlemen of the jury, and your uncle and his lawyer can hear you, would you tell us where you were living last November? A. 1744 Hobart Street.

Q. 1744 Hobart Street, Northwest? A. Yes, sir.

MR. BURKA: You will have to speak a little louder than that.

Q. Is that an apartment or a private house? A. Private house.

Q. Did anyone else live there other than your uncle Henry and aunt? A.

Yes, they do.

Q. Who else lives there? A. Another family.

Q. And where do you, your auntie and your uncle live? A. Upstairs.

8 Q. How many rooms were there upstairs? A. We have a bedroom upstairs, living room on the first floor, and a kitchen.

THE COURT: What is upstairs, Clara?

THE WITNESS: A bedroom.

THE COURT: Anything else besides the bedroom?

THE WITNESS: The bathroom.

THE COURT: Is that all?

THE WITNESS: A closet.

THE COURT: All right.

BY MR. BURKA:

Q. Do you live with your aunt and uncle all the time, Clara? A. Yes, sir.

Q. Where do you sleep? A. I have a bed of my own.

Q. You have a bed of your own? A. Yes, sir.

Q. Where is that bed? A. Right beside my aunt's bed.

Q. Your aunt and uncle sleep in the same bed? A. Yes, sir.

Q. Now, calling your attention back to last November, Clara, the 14th of November, do you remember what day that was the police came to your house?

A. Yes, sir.

9 Q. What day of the week it was? A. It was Thursday, November 14, 1957.

Q. Thursday, November 14, 1957? A. Yes, sir.

MR. BURKA: Now, remember to keep your voice up so these two gentlemen all the way down here can hear what you say.

Q. I want you to go back to that day, Clara, at about 10:00 at night, can you tell us what happened between yourself and your uncle and your auntie?

MR. BURKA: Now, keep your voice up so these gentlemen can hear what you say.

A. Well, Thursday, November 14, my uncle came in around 10:00 o'clock.

MR. BURKA: Now speak slowly so we can understand and I will stand all

the way back here, so speak so I can hear you.

THE WITNESS: Thursday, November 14, well, my uncle came in around 10:00 o'clock and I was getting ready to take my bath and I was looking at television.

BY MR. BURKA:

Q. You were getting ready to take a bath and looking at television and? **A.**
And so he told us to get in the bed.

Q. Who is he? **A.** My uncle.

10 **Q.** Do you see him in the courtroom today? **A.** Yes, sitting over there.

Q. What is he wearing? **A.** A light blue sweater and I think it is a black and red shirt.

MR. BURKA: That is fine. Your Honor, may the record indicate the witness identified the defendant, please.

THE COURT: All right.

BY MR. BURKA:

Q. Please continue and tell us what happened after your uncle came in? **A.**
He told my aunt to go downstairs and get some coffee.

Q. Did you use a kitchen downstairs for cooking? **A.** Yes, sir.

Q. Did your aunt go downstairs? **A.** Yes, sir.

Q. Tell us what happened after that? **A.** She went downstairs and got the coffee and she brought it back up.

THE COURT: Where were you when she went downstairs?

THE WITNESS: I was in bed.

THE COURT: You were in the bed?

THE WITNESS: Yes, sir.

THE COURT: All right.

11 **BY MR. BURKA:**

Q. Your aunt went downstairs and where was your uncle? **A.** He was in bed.

Q. Where were you? **A.** I was getting ready to get in bed.

Q. Was the television set in the same room? **A.** Yes, sir.

THE COURT: Did you get into the bed?

THE WITNESS: Yes, sir.

THE COURT: When?

THE WITNESS: After my aunt left.

MR. BURKA: What was that answer?

THE COURT: After her aunt left.

Q. Now, which bed did you get into? A. He told me to get into my aunt's bed.

MR. BURKA: Now, keep your voice up so, as I said, these two gentlemen all the way down here can hear you.

Q. Tell us what happened between yourself and your uncle while your aunt was downstairs? A. While my aunt was downstairs getting coffee he told me to get in bed and at first I didn't get in bed so I had to take off my shoes.

Q. He kept telling you to get into bed? A. Yes, sir.

Q. Tell us about it? A. So then when I got in bed he told me to take off my pants.

Q. He told you to do what? A. To take off my panties.

Q. All right, then what happened? Did you take them off? A. Yes, sir.

Q. What happened then? A. Then while he got on top.

THE COURT: He what?

THE WITNESS: He got on top.

THE COURT: Of you?

THE WITNESS: Yes, sir.

MR. BURKA: Clara, we know you may be a little embarrassed but we are all here in court just to find out what happened and you do not have to worry about what you say, so just tell us exactly, since we were not there, and we can only know what happened by what you tell us. You have to be our eyes, so to speak, so speak so these two gentlemen down here can hear you.

Q. Now, tell us exactly what happened after he told you to take your pants off. You said he got on top of you? A. Yes, sir.

MR. BURKA: Keep your voice up and try not to be embarrassed and tell us what happened.

13 Q. Now what happened? A. After I took my pants off he took and got on top of me.

THE COURT: And what did he do after that?

THE WITNESS: He started working up and down.

THE COURT: Started working up and down? His body?

THE WITNESS: Yes, sir.

THE COURT: Did he have any clothes on?

THE WITNESS: He had on his undershirt and shorts.

THE COURT: Did he have his shorts on?

THE WITNESS: Yes, sir.

BY MR. BURKA:

Q. Clara Lee, were any of his private parts exposed? A. No, sir.

Q. Did you feel any of them? How long was he on top of you working up and down, as you say, Clara Lee was it just a few minutes or a long time? A. A long time.

Q. I couldn't hear you. What did you say? A. I think it was a long time.

Q. Now did your aunt finally come back upstairs? Did you see anyone come back upstairs? A. Yes, sir.

Q. What happened when she came upstairs? Did she say anything? A.

14 She came upstairs and she gave him coffee.

Q. She gave your uncle coffee. Then what happened? A. She said she forgot to cut off the coffee pot.

Q. And she went back out? A. Yes, sir.

Q. Has your uncle ever done this to you before, Clara Lee, before that time?

MR. ROBERSON: I object, Your Honor.

THE COURT: It is permissible, this type of crime.

Q. Had your uncle ever done anything like that to you before, Clara Lee?

A. Yes, sir.

Q. And when had he done this before, at night or in the day time? A. In the evening.

MR. BURKA: I could not hear you.

THE WITNESS: In the evening.

Q. Was your aunt ever home when he had done this? A. Yes, sir.

Q. Did you ever tell anyone about this, about what your uncle did? A. No, sir.

Q. Why didn't you, Clara? A. He said if I told anyone he was going to kill me.

Q. Do you remember how many times he has done this? A. Around four times.

15 MR. BURKA: I have no further questions of this witness, Your Honor.

CROSS-EXAMINATION

BY MR. ROBERSON:

Q. Had your uncle been drinking? A. Yes, he had been drinking, he didn't have too much.

THE COURT: What is that, he had been drinking but he didn't have what?

THE WITNESS: He didn't have too much.

BY MR. ROBERSON:

Q. When your uncle said that, as you say, that he said to you, he would kill you, you didn't think that he would kill you, did you? A. I didn't know, I don't know.

Q. But you didn't believe it, you weren't actually afraid of your uncle, were you? A. Not too much.

Q. He had always been kind to you, hadn't he? A. Yes, sir.

Q. Treated you like a daughter, hadn't he? A. Yes, sir.

Q. He seemed to love you, didn't he? A. Yes, sir.

Q. In fact, he was always giving you nice things, wasn't he? A. Yes, sir.

16 MR. ROBERSON: I have no further questions, Your Honor.

THE COURT: That is all, you may step down.

(The witness left the stand.)

MR. BURKA: Your Honor, before the witness leaves I would like to proffer the defendant the statement of the complaining witness, of the next witness, so the record may be clear.

THE COURT: You do not have to give it to him if you do not wish to.

MR. BURKA: I would like to. Please call Alice Wilson.

Whereupon

ALICE WILSON

was called as a witness on behalf of the Government and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BURKA:

Q. Would you please give us your name? **A.** My name is Alice Wilson.

MR. BURKA: Please speak so all the ladies and gentlemen of the jury, the defense counsel, as well as His Honor, may hear you.

17 **BY MR. BURKA:**

Q. Now, what is your address? **A.** My address is 1744 Hobart Street, Northwest.

Q. Do you know the defendant in this case, Henry Wilson? **A.** Yes, I do.

Q. Is he your husband? **A.** Yes, sir.

Q. How long have you been married? **A.** Thirty years Christmas past.

Q. Thirty years this past Christmas? **A.** Yes.

MR. BURKA: Now, ma'am you know as you are his lawfully wedded wife, you do not have to testify against him in this case. Now, knowing that do you still wish to proceed and testify in this case?

THE WITNESS: I don't have to?

THE COURT: You do not have to, you may but you do not have to.

THE WITNESS: Well, I won't then.

MR. ROBERSON: May the reporter read her answer?

THE COURT: Yes.

(Reporter read answer.)

THE COURT: Step down.

(Whereupon the witness withdrew from the stand.)

MR. BURKA: Please call Officer Southcomb.

18 Whereupon

GRISBY B. SOUTHCOMB

was called as a witness on behalf of the Government and, having been duly sworn,

was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BURKA:

Q. Please state your name and assignment? A. Grisby B. Southcomb, Precinct Detective, assigned to Tenth Precinct.

Q. Were you so assigned on November 14, 1957? A. Yes, sir.

Q. Did you have occasion to respond to a call at 1744 Hobart Street, Northwest? A. I did, sir.

Q. Would you tell us what you saw when you arrived at that address? A. I went to that address at approximately 11:40 P. M. In the company of Mrs. Wilson and the complainant I went to the bedroom on second floor rear and I found the defendant laying in the bed.

Q. How was he dressed? A. He had his outer shirt on, underpants, and socks.

Q. What time did you arrive there?

THE COURT: 11:40 he said, Isn't that what you said?

19 THE WITNESS: Yes, Your Honor.

BY MR. BURKA:

Q. You went immediately upstairs when you arrived? A. Yes, sir.

Q. Was there anyone else in the bedroom? A. Yes, sir, the complainant was there.

Q. By the complainant do you mean Clara Lee Gardener? A. Yes, sir.

Q. How was she dressed? A. She was dressed in a slip, sir.

Q. What was she doing when you walked into the room? A. She was standing alongside the bed and straightening the covers out.

Q. Did she make any statement to you in the presence of the defendant, did you ask her any questions in the presence of the defendant? A. No, sir, she wouldn't make any statement to me in the defendant's presence.

Q. Then you questioned the defendant at that time? A. No, sir.

Q. Did you place the defendant under arrest? A. Yes, sir.

Q. What time did you place him under arrest? A. At 11.40 P.M., sir.

Q. How long have you been a Police Department officer, Officer Southcomb?

20 Q. Sixteen years.

Q. Have you had occasion to arrest few or many persons for being intoxicated during that sixteen years on the Police Department? A. Many, sir.

Q. Did you smell any odor of alcohol on the defendant's breath? A. I smelled a slight odor of alcohol.

Q. Did you have to assist him in getting dressed when you placed him under arrest? A. No, sir.

Q. Did he talk to you at all while he was getting dressed? A. He just couldn't seem to understand why he was being arrested.

Q. Was his speech slurred? A. No, sir.

Q. Did he have any trouble getting his words out? A. No, sir.

Q. Did he stagger in any way as he walked downstairs? Did he require any assistance whatsoever? A. No, sir.

Q. In your opinion, Officer Southcomb, considering your sixteen years on the Police Department, did many persons when you have arrested them for being
21 intoxicated, would you say this defendant was intoxicated when you placed him under arrest? A. He was not, sir.

Q. Where did you take the defendant, Officer Southcomb? A. To number 10 precinct.

Q. What time did you arrive at number 10 precinct? A. I would say it was approximately 11:55 P. M.

Q. Was the defendant booked at that time? A. He was, sir.

Q. Was he charged with an indecent act on a minor child? A. No, sir.

Q. What was he charged with? A. He was booked for investigation at that time, sir.

Q. The investigation being the investigation of this particular offense? A. Yes, sir.

Q. Did there come a time when he was confronted with the complaining witness in the office of the sex squad room. A. Yes, sir.

Q. What time was that? A. That was approximately 9:45 the next morning,

the morning of the fifteenth.

22 Q. Who was present? A. The complainant, Mrs. Wilson, Detective Bonaccorsy, Mrs. Plath, who is the police woman, and myself.

Q. Were you present when the defendant was arraigned? A. No, sir.

Q. Do you know whether that was on November 14 or November 15, 1957?

A. It was, yes, sir.

MR. BURKA: Your Honor, may we approach the bench?

THE COURT: Yes.

(At the bench:)

MR. BURKA: Your Honor, since this offense took place well before midnight on the 14th, the defendant was not arraigned, according to my records, until some time after 10:00 on the 15th and since he wasn't confronted with any of the complainants statements -- his wife's statement -- until that morning, under the decision of the Mallory case, I am afraid to go ahead with anything so, I don't see any use of burdening the Court with anything that pertains to the Mallory ruling, therefore, I will stop with this witness. I think Your Honor will find he didn't have a speedy enough arraignment.

THE COURT: I haven't found the formula.

(End of Bench:)

Open Court:

MR. BURKA: The Government has no further questions of this witness, Your Honor.

23

CROSS-EXAMINATION

BY MR. ROBERSON:

Q. Was there a medical examination? A. Yes, sir.

Q. What were the results of that medical examination? A. I wasn't present when that was made, sir.

Q. Do you know the results? Have you been informed as to the results? A. I have, sir.

MR. BURKA: The Government will stipulate that the doctor found the hymen intact.

THE COURT: In other words, there is no evidence of criminal assault?

MR. BURKA: There is no evidence of penetration.

BY MR. ROBERSON:

Q. You stated that the defendant couldn't understand why he was being arrested. Specifically, what was the nature of the statements that he made to you?

A. He just said he hadn't done anything.

Q. And when you took him to the precinct you booked him for investigation. Why was he booked for investigation and not charged? **A.** So we could complete our investigation.

Q. And at what point did you say that you completed your investigation, at what time? **A.** I can't say that, sir, it was some time after the medical examination.

24

Q. On what day? **A.** By the early morning of the 15th of November.

Q. Now then when was the defendant arraigned?

THE COURT: He doesn't know, he said.

BY MR. ROBERSON:

Q. The reason you did not charge the defendant, you believed what he said to you, is that right, that there was some reason for you to doubt the charges against him? **A.** No, there wasn't. He was not charged until after the medical examination and that was the reason he wasn't charged before that time.

Q. Do you remember the room in which the defendant was in when you went to arrest him? **A.** Yes, sir.

Q. Do you remember the layout of that room? **A.** Yes, sir.

Q. Briefly, would you describe it to the Court and ladies and gentlemen of the jury, as near as you can, what were the dimensions of the room, approximately? **A.** I would say approximately nine by twelve.

Q. Approximately nine by twelve? **A.** Yes, sir.

Q. Do you remember how many beds were in that room? **A.** Yes, sir.

25

Q. How many beds were in there? **A.** Two beds.

Q. What was the size of the beds? **A.** As I recall it was a double bed and a single bed.

* * * * *

26 MR. BURKA: The only other witness the Government has at this time is Detective Bonaccorsy, who was present at the arraignment.

THE COURT: Does the Government rest?

MR. BURKA: Yes, sir.

(End of bench.)

OPEN COURT:

MR. BURKA: The Government rests, Your Honor.

MR. ROBERSON: Your Honor, at this point the defense would like to move for a judgment of acquittal on two points. Number 1 being that this man has been denied due process of law.

THE COURT: What does due process of law have to do with it?

MR. ROBERSON: Beg your pardon?

THE COURT: No confessions have been offered.

MR. ROBERSON: Further, Your Honor, the Government has not shown that the defendant actually committed an act with the intent required here.

THE COURT: That is up to the jury to decide, not me.

MR. ROBERSON: I was thinking that as a matter of law there wasn't sufficient evidence to submit to the jury.

27

THE COURT: The motion is denied.

* * * * *

CHARLES WILSON

was called as a witness on behalf of the defendant and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROBERSON:

Q. Mr. Wilson, would you state your full name and address to the court and jury? A. Charles Wilson.

MR. ROBERSON: Speak up loudly so all the persons of the jury and the Court can hear you, Mr. Wilson.

Q. Where do you live, Mr. Wilson? A. I live at 5230 Banks Place, Northeast,

Washington, D. C.

Q. Do you know the defendant, Henry Wilson? A. Yes, I do.

Q. Where is he? A. Sitting beside you.

Q. Are you related to the defendant? A. No, I am not.

Q. Calling your attention to Thursday, November 14, 1957, did you have an occasion to be with Mr. Wilson? A. Yes, I did.

28 Q. Would you state to His Honor and the ladies and gentlemen of the jury the circumstances surrounding your being with Mr. Wilson? A. Well, during that Thursday, I don't remember what date it was, but usually the type work I does and the type work he do, you can't work in bad weather. It was raining. He came by my house and he had a pint of whisky.

THE COURT: What time was this?

THE WITNESS: Around 5:30 or 6:00 o'clock in the afternoon.

THE COURT: All right.

A. (continuing) And he sat down at my dining room table -- just stopping at that time. We drank that and decided to go to the store and get another pint.

THE COURT: You drank a pint first?

THE WITNESS: Yes, sir.

THE COURT: And then you got another pint?

THE WITNESS: Yes, sir.

A. (continuing) And money gave out and we pawned the spare wheel of his car and got another pint and drank that.

THE COURT: You used up three pints between the two of you?

THE WITNESS: Between the two.

29 BY MR. ROBERSON:

Q. About what time was it that you got this third pint of whisky? A. Beginning at that time around 5:30 and between 8:30 and 9:00 o'clock he left so we drank those pints between 5:30 and 8:30 o'clock, something like that.

Q. What was the condition of Mr. Wilson's sobriety at the time he left you?

A. At the time his condition was in pretty bad shape because he was at home and I know how it was, it was raining and I figured he couldn't see the distance to drive.

Q. He couldn't see how to drive? A. By it being foggy and rainy and his being intoxicated, I didn't see how he could drive himself home and I offered him to stay awhile so he could straighten up but he took a gamble and went.

Q. Do you remember what time he left your home? A. Between 8:30 and 9:00 o'clock.

Q. Do you remember when Mr. Wilson first came to your home on that date, he appeared as though he had been drinking prior to his coming to your home?
A. He came in with the first pint and he had, had took one shot out of it, how much more than that, I don't know.

CROSS EXAMINATION

BY MR. BURKA:

30 Q. What day are you talking about, Mr. Wilson? A. It was on a Thursday, it was raining that day and I couldn't work and he couldn't work either.

Q. Was it a Thursday in September? A. Yes, it was stated it was, it must have been the 14th.

Q. Thursday in July? A. I don't know because I got the message --

THE COURT: What month?

THE WITNESS: It must have been November or February but what I mean you see the people he lives with are friends of mine.

THE COURT: He wants to know what month it was in?

THE WITNESS: I said it had to be a couple or three months ago.

THE COURT: Was it in November?

THE WITNESS: Your Honor, I want to ask you, the people he lived with, the fellow came by my house.

THE COURT: That is how you place the day because he got in trouble the next day?

THE WITNESS: The next day the fellow he lives with came by my house.

THE COURT: That is how you can fix the date is because he got in trouble?

THE WITNESS: Yes, sir, on the 14th.

31 BY MR. BURKA:

Q. Did you go down the street with him? A. Yes, we were riding in his automobile, we had to go to the whisky store to get the whisky.

Q. You each had a pint of whisky before you went for the third? A. We each had drunk two pints between the two of us.

Q. Do you live on the first floor or second floor? A. I have a house of my own, he came to visit me.

Q. Are there any steps going to the street? A. Yes, sir.

Q. And you got to his car all right after you each finished the whisky?

THE COURT: He is talking about the time you went to get the third pint.

A. We were both pretty gay, we managed to go to the whisky store.

Q. Did you drive to the whisky store? A. Yes, the whisky store is about six or seven blocks from my house.

Q. Then what did you do after you got back? A. After we came back we sat there and nipped on that third pint.

Q. You have drunk more than a pint of whisky? A. No.

32 Q. A pint of whisky isn't much? A. Sometimes I can drink more and sometimes I can't, it all depends on your system.

Q. And Henry has had at least a pint with you many times? A. Many times.

Q. Has he ever drunk drunk a fifth? (sic) A. During the length of time when we drink three or four hours we drink up one bottle and chip in and get another one.

Q. Did you go with Henry after you finished the third pint of whisky? A. No, I didn't go back at all.

Q. Did you see him get into his car? A. I heard him pull out.

Q. You don't know whether he had any trouble or not? A. No, sir.

Q. Do you know whether he ate anything on the way home? A. No, sir.

Q. Do you know whether he was drunk when he got home? A. No, sir.

* * * * *

33

CLARA LEE GARDENER

was called as a witness for the defense, and after preliminary examination of her knowledge of being truthful, ^(S) was reminded she was still under oath, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROBERSON:

Q. Clare, who sleeps in the large bed in your bedroom? A. My uncle and my aunt.

Q. Who else?

34 Q. Do you know Arnold Wilson? A. Yes, I do.

Q. Is he your cousin? A. Yes.

Q. Where was he sleeping at the time that this incident occurred? On what bed was he sleeping? A. On the small bed.

Q. Small bed in this bedroom where you were? A. Yes.

THE COURT: Was he there that night?

THE WITNESS: Yes, sir.

THE COURT: And he was sleeping in the small bed?

THE WITNESS: Downstairs.

THE COURT: Sleeping downstairs?

THE WITNESS: No, sir.

THE COURT: Did he sleep in that bed in that room?

THE WITNESS: Yes.

THE COURT: Where were you sleeping?

THE WITNESS: I slept with my uncle and aunt.

THE COURT: Three in the bed?

THE WITNESS: Yes, sir.

BY MR. ROBERSON:

Q. And how long had you been sleeping in the bed with your aunt and your uncle, Clara? A. Oh, it wasn't too long.

35 Q. Shortly before Christmas, about Christmas, when your cousin came to Washington? A. No, he came in the summer.

Q. He came in the summer but it was shortly before Christmas when he started sleeping up there. I would say about several weeks that he had been sleeping in that bedroom with you all, hadn't it? A. No, he had been sleeping in the bedroom ever since he came.

Q. Which was in the summer time? A. Yes.

Q. Do you know about how old your cousin is? A. Seventeen.

Q. Seventeen years old? A. Yes, sir.

Q. And you slept each night during the time he was in the small bed, you slept in the large bed with your uncle and aunt, is that true? A. Yes, sir.

Q. At the time when your aunt went downstairs to get coffee, were there lights on or off in the bedroom? A. The lights were on. We have a light from the -- it was a television light.

Q. Only the lights from the television? A. Yes.

36 Q. It was not unusual for your uncle to come in and ask you to turn off the television so he could go to bed, was it? A. No.

Q. And from time to time in the course of sleeping, your uncle's arm had gotten over you? And other nights had your uncle thrown his arm across you when he was sleeping? A. My aunt slept in the middle.

Q. The aunt sleeps in the middle and you sleep on the other side? A. Yes, sir.

MR. ROBERSON: I see. I have no further questions.

THE COURT: That is all. Step down.

(The witness left the stand.)

MR. ROBERSON: I would like to put the defendant on the stand.

Whereupon

HENRY WILSON

the defendant, took the stand in his own behalf, and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROBERSON:

Q. Will you state your name and address? A. Henry Wilson, 1741 Hobart Street.

MR. ROBERSON: Now speak up loudly so nobody will have any difficulty hearing you.

37 THE WITNESS: Henry Wilson, 1744 Hobart Street, Northwest, Washington, D. C.

BY MR. ROBERSON:

Q. Northwest? A. Yes, sir.

Q. Directing your attention to Thursday, November 14, 1957, would you relate to His Honor and the ladies and gentlemen of the jury just what happened during that day? A. Yes, sir, Thursday morning, November 14, I went to work.

MR. ROBERSON: Please speak up.

A. (Continuing) I worked up until 12:00 o'clock and it started to rain. We were doing grading work. We all quit work and I borrowed a dollar from the foreman from out there --

MR. ROBERSON: Speak up.

A. (Continuing) And I came on home. I laid down and took my rest and I got up and got a ride across town and I borrowed \$2.00 from a man here and came on back and at Fourth and E Street, at a filling station, I got some gasoline and I went in the liquor store and bought a pint of whisky, took a drink of that and I went out to a friend's house. He wasn't home when I got there and his daughter was there and said come on in, but I didn't go in until he came home. And I got a pint of whisky and drank that there. We got another pint and we drank that. So,
38 his son came in and he says, do you want to chip in and get another, and we said we would go get the pint ourselves, and he said he said he would buy some beer -- we had some gin already in the car. I don't know exactly what time it was when I left his house but he tried to get me to spend the night at his house. He tried -- he thought --

MR. ROBERSON: Speak up.

A. (Continuing) I think he thought I couldn't drive home and I told him I would try to make it so I could work the next day if it wasn't raining.

Q. Then what happened? A. After I got on home and got in the car that is the last thing I remember.

Q. When did you next come to consciousness or realization of what was taking place? A. Sir?

Q. You say you don't remember anything after you got out of your car?
A. No, sir.

Q. Do you remember whether or not you locked your car? A. I don't remember whether I locked it or let the water out or anything. It didn't have any anti-freeze.

Q. When did you next become conscious of what was going on around you?

39 A. The next thing I remember two officers were standing up there at the door and my wife was standing behind them and pushing them in and I asked what is the trouble, and he said, were you fooling with that child, and I said, I know nothing about that child, and he said, you are under arrest and I was feeling pretty badly and drunk, and I asked him to lock me up and so about three or four that morning two men came in and asked me to come out of the cell, and they said, well, we took that little child to the doctor and the doctor said you didn't even touch her, and he said, well the doctor -- I told her mother the same thing. They said wasn't I raising some sand with my wife, wasn't you feeling your wife out? How in the world could I feel my wife out? How could I reach over my wife and feel over somebody in the back. That is the word he brought to me.

Q. Now, tell me how long -- how many of you sleep in that bedroom? A. Four of us.

Q. In the bedroom. A. Four of us.

Q. And how do you sleep in the bedroom? A. Me and the wife and Clara sleep together. This boy, he came up here.

Q. The boy you are referring to is Arnold Wilson? A. That is right, yes.

Q. Is he related to you? A. He is my wife's sister's son.

40 Q. Wife's sister's son? A. Yes.

Q. Go ahead. A. After he came up there my wife took this little girl out of the bed she used to sleep in and put her in the bed with me and her and puts him in that bed.

Q. How long did that arrangement exist? A. Let me see. It has been around three months or better.

Q. Three months or better? A. Yes.

Q. Prior to this incident? A. That is right.

Q. Had you ever tried to get any other arrangement so -- were you satisfied with this arrangement of sleeping? A. I told my wife several times us move and try to get a larger apartment, that it was too crowded and she had ordered -- it was one, there was another boy moving over there.

Q. And what happened then? A. Next she heard he was married, I guess it was about five months ago but another man moved right in that room.

Q. So that left only the one room in which the four of you slept, is that right?

A. That is right.

Q. Have you ever had any relations or tried to satisfy your -- in the terms
41 of the indictment -- lust or passion, by fooling with Clara? A. I never
fooled with that child.

Q. How long has Clara been with you? A. We raised her from a baby.

Q. How do you feel toward that child? A. I thought just as much of that
child as I could one of my own. I don't see --

THE COURT: Speak up.

Q. I don't see why she would let somebody persuade her into a lie, to lie
on me.

Q. She was persuaded to tell a lie. What do you mean by that? A. Well,
when they took us down to the -- the day.

Q. What office? A. The day office, my wife was already down there and
Clara was there too.

Q. Who else? A. This young boy, he was sitting in one chair and my wife
had this little girl in another room where they were questioning and the lady offi-
cer tells me to sit by this door.

Q. Go ahead. A. And I sit by the door and I see when the little girl says
anything, they say don't you open your mouth, and I said not a word. Well, he
pulled me up there and bring the little girl facing them and me, and my wife by
42 her side, and they say, all right, tell us what uncle Henry has done to you.
And we sat there and didn't say nothing and they kept on and she said, I am be-
ginning to believe you, uncle Henry. Now actually another gentleman said, what
are you going to do, and he said, I might throw the dam thing out.

THE COURT: Who said that, the policeman?

THE WITNESS: Yes, sir.

THE COURT: Which one?

THE WITNESS: I don't know him -- down at the DA's office there.

THE COURT: The policeman who testified here today?

THE WITNESS: No, sir, he was down there.

THE COURT: He didn't say throw it out?

THE WITNESS: No, sir, it was the one that picked me up.

THE COURT: Was it Officer Bonaccorsy?

THE WITNESS: I ain't never seen him before.

THE COURT: Do you know Officer Bonaccorsy?

THE WITNESS: No, sir, I don't know the name of the officers.

A. (Continuing) The little girl got up and walked back in the other room and sat down and my wife went into the other room back there and I don't know what they tell the child, and in a few minutes the child came back and swore I did something to her.

43 THE COURT: To the policeman?

THE WITNESS: That is right.

CROSS-EXAMINATION

BY MR. BURKA:

Q. Are you sure you didn't do anything to Clara Lee on the night of November 14? A. How could a drunk man do anything?

Q. Just answer the question. A. I was drunk, I don't remember nothing.

Q. Are you sure you didn't do anything to this little girl? A. If I did, I don't remember it.

Q. You don't remember whether you did or not? A. I was drunk I don't remember nothing.

Q. How far is it from your friend's house to your house? A. What friend?

Q. The man whom you were drinking with. A. About two miles.

Q. You were able to drive that all right? A. As long as I am driving when I am drinking I am all right but the minute I stop.

MR. BURKA: That is all the cross-examination I have.

44 THE COURT: Step down.

(The witness left the stand and returned to his seat in the courtroom.)

THE COURT: The Court will recess for ten minutes. (The Court recessed)

at 11:20 and reconvened at 11:30.)

OPEN COURT AFTER RECESS:

MR. BURKA: The Government has one witness in rebuttal, Your Honor.

MR. ROBERSON: I object.

THE COURT: She doesn't want to testify.

MR. BURKA: She states now she does, Your Honor, in rebuttal to the defendant's testimony.

THE COURT: It will only have to be rebuttal, it can't be direct testimony. Do you now want to testify?

MRS. WILSON: Yes, sir.

THE COURT: All right.

Whereupon

ALICE WILSON

resumed the stand as a rebuttal witness on behalf of the Government and, having been reminded she was still under oath, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BURKA:

Q. Calling your attention to November 14, 1957, what time did your husband come home? A. Ten o'clock.

45 Q. In the evening? A. Yes, sir.

THE COURT: You do not need to ask her what time he came home, he said he came home.

BY MR. BURKA:

Q. Did you smell any alcohol on his breath? A. I smelled a little.

Q. Did he converse with you in a normal tone of voice? A. He was pretty liquored up but he wasn't drunk.

Q. Did you see him come up the steps? A. No, sir, because I had my room door closed, he came in and opened it.

Q. Did he have any trouble walking? A. No, sir.

Q. Did he seem vague or indefinite in any of his actions? A. No, he didn't.

Q. Did he do anything from out of the ordinary from when he had not been

drinking? A. He came in and told us to cut the light out and get in bed and told my niece --

MR. BURKA: You can't testify as to that.

Q. Did he do anything different than what he does when he had not been drinking? A. No, sir.

46 MR. BURKA: I have no further questions of this witness, Your Honor.

CROSS-EXAMINATION

BY MR. ROBERSON:

Q. Haven't you said on other occasions that whenever the defendant, Mr. Wilson, gets one drink he goes crazy? A. He would act a little difficult toward me.

MR. ROBERSON: I have no further questions, Your Honor.

MR. BURKA: The Government has no further rebuttal witnesses, Your Honor.

THE COURT: That is all, step down.

(The witness left the stand.)

* * * * *

53

CHARGE TO THE JURY

THE COURT: (CURRAN, J:) Ladies and gentlemen of the jury the defendant in this case, Henry Wilson, is charged in an indictment containing one count: That on or about November 14, 1957, within the District of Columbia, Henry Wilson, did take immoral, improper and indecent liberties with Clara R. Gardner, a female child under sixteen years of age, that is, about eleven years of age, with the intent of arousing, appealing to and gratifying the lust, passions and sexual desires of the said Henry Wilson.

This paper writing that I have just read to you, ladies and gentlemen, is the indictment of the case. It is not evidence in the case and is not to be considered by you as evidence in the case. The fact that a person has been charged with a

54 crime is not evidence that he committed the crime. The indictment is the machinery by which the Government puts into operation a person's trial. He is charged with the crime and he is charged by a grand jury returning the indictment but this is not evidence against him so you will not consider the indictment as evidence in this case.

The defendant is presumed to be innocent and that presumption of innocence abides with him throughout the progress of the trial until such time as it is overcome by evidence establishing his guilt beyond a reasonable doubt.

In a criminal case the burden is always upon the Government to prove the defendant guilty, and the Government must prove a defendant guilty beyond a reasonable doubt. That doesn't mean that the Government must prove a defendant guilty beyond all doubt whatsoever or prove a defendant guilty to a mathematical or an absolute certainty. It merely means the Government must prove a defendant guilty to a moral certainty, or, as stated in law, proves a defendant guilty beyond a reasonable doubt.

Now, what is reasonable doubt? A reasonable doubt is a doubt for which you may assign a reason. It is doubt based on reason, it is founded on reason, it is a doubt that connotes something of substance as compared with something shadowy. It is such a doubt as would leave a juror's mind, after a careful and candid investigation of all the facts and circumstances, so undecided that he is unable to say that he has an abiding conviction of the defendant's guilt, or in
55 other words, it is such a doubt as in the graver and more important transactions of life would cause an ordinary and prudent person to hesitate and pause. A reasonable doubt may arise not only from the evidence produced at the trial but, also, from the lack of evidence.

The law doesn't impose upon a defendant the duty of producing any evidence. The burden is always upon the prosecution to prove the defendant guilty beyond a reasonable doubt of every essential element of the crime charged and a defendant has the right to rely upon the failure of the Government to establish its case beyond a reasonable doubt.

In order to establish proof beyond a reasonable doubt, the evidence must be such as you would be willing to act upon it in the more weighty and important matters of your own affairs in your own life because you cannot convict a defendant on mere suspicion or conjecture.

If, after impartial comparison and consideration of all the evidence you can candidly say to yourself that you are not just satisfied that the defendant is guilty then you would have a reasonable doubt and under the circumstances it would be your duty, under the law, to return a verdict of not guilty.

If, on the other hand, after such impartial comparison and such consideration of all the evidence, you can truthfully say you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more

56 weighty and important affairs in your own life, then, of course, you have no reasonable doubt, and under the circumstances, it would be your duty to, under the law, return a verdict of guilty.

As you know, ladies and gentlemen of the jury, you are the sole judges of the facts in this case, and in this respect the Court cannot be of any assistance to you whatsoever. It is for you to decide the weight that you shall give to the evidence that you have heard from the case. And, you should weigh the evidence very carefully which has been presented to you for you are the ones who pass upon the credibility of the witnesses, and in this connection you have the right to consider the demeanor of the witness on the witness stand, the witness' manner of testifying, whether the witness was evasive, whether the witness was frank and candid in his testimony, whether the witness was uncontradicted on the material facts, whether the witness had any interest in the outcome of the trial, whether the witness impressed you as a person having an accurate memory and recollection, and you may also consider the probability and improbability of the testimony as told by the witness and its harmony or incongruity with other facts in the case which you do find to be established beyond a reasonable doubt.

You are also instructed that if you believe from the evidence any witness
57 testified falsely concerning any material fact about which the witness could not have been reasonably mistaken, then you are at liberty to disregard all of the testimony of that witness or accept such part of the testimony as you deem worthy of belief.

This is a prosecution, ladies and gentlemen of the jury, brought under the District of Columbia Code, Title 22, Section 3501, which provides that: "Any person who shall take, or attempt to take any immoral, improper, or indecent liberties with any child of either sex, under the age of sixteen years with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires, either of such person or of such child, ..." shall suffer a certain punishment.

Now the Government contends, ladies and gentlemen, that on November 14, 1957, that while the complaining witness, Clara Gardner, was in the bedroom that the defendant told her to take her pants off and get into bed, and that she got into bed and after she did, that the defendant got on top of her and moved his body in an up and down motion on her and that he was doing it with the intent of arousing his passion.

You are, therefore, instructed that if you believe and believe beyond a reasonable doubt, that on November 14, 1957, within the District of Columbia, Henry Wilson, did take any immoral, improper, or indecent liberties with Clara Gardner, a female child under sixteen years of age, that is about eleven years
58 of age, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of Henry Wilson, it is your duty under the law, to return a verdict of guilty as indicted.

If you have a reasonable doubt about it and do not believe he did, then, of course, it would be your duty under the law, to return a verdict of not guilty.

The defense in this case is intoxication. Voluntary intoxication, ladies and gentlemen of the jury, does not excuse the commitment of a crime. A person, who, being sane and responsible for his acts, voluntarily becomes intoxicated, with or without a preconceived design to commit a crime and while intoxicated, it being to such a degree as to render him unable to distinguish between right and wrong, does any act which if done by a person capable of distinguishing between right and wrong, would not be excusable for his act, notwithstanding his mental condition at the time, and it matters not how long his drunkenness has been unless, of course, it had produced a state of insanity as for example, delirium tremens.

Now, the underlying principle, ladies and gentlemen of the jury, just stated to you, is that a sane man who voluntarily puts himself in such a condition as to have no control of his will or acts, must be held to intend the consequences, seen or unforeseen and be held responsible for what he does while in that condition.

59 Ladies and gentlemen of the jury, a crime is ordinarily made up of a criminal intent to do something and doing it. In other words, there is intention plus the act. Ordinarily, a criminal intent to do wrong is sufficient. Congress, in its

wisdom, has passed some laws where it is a crime if you commit them regardless of what your intent may be, you may do it at your own risk. There is another type of law, of crime, I should say, which requires a specific intent and without that specific intent there can be no crime of that kind and character. And it is that type of crime that we have here because this crime requires that he take immoral, improper, and indecent liberties with a female under the age of sixteen years, with the specific intent of arousing, appealing to, or gratifying his lust, passions or sexual desires.

Now, as I have said to you, although voluntary intoxication is not an excuse for crime, it has an important bearing on the question of guilt as regards this crime of which a specific intent is an essential element. Now, the mere fact a person is intoxicated at the time he did a criminal act does not show that he was incapable of forming an intent, for a man may be drunk and at the same time be able to deliberate, be able to form the intent, but if the intoxication is so extreme so as to suspend the power of reasoning and the subject is incapable of forming an intent, then, of course, he cannot be held guilty of the crime which involves a specific intent, therefore, ladies and gentlemen of the jury, if you

60 believe he was intoxicated and despite the fact that he was intoxicated, you believe beyond a reasonable doubt he could perform the intent to commit this act, then intoxication was no excuse, and you must find him guilty. But, if you have a reasonable doubt about it or if you believe he was so drunk he was incapable of forming the intent, then you must find him not guilty.

Now, this is a serious case, ladies and gentlemen of the jury, both from the standpoint of the Government and from the standpoint of the defendant. You should weigh the evidence very carefully, analyze it, separate the evidence which you believe from the evidence you disbelieve, and apply to it the common sense you would, as I have told you before, to the more weighty and important affairs of your everyday life.

Now, the child, Clara Gardner, you should scrutinize, of course, carefully the testimony of a girl ten years old. It doesn't mean you should disregard or disbelieve her testimony but you should consider it carefully.

After you have done all those things, you should apply the common sense you do in your own life then you will reach a proper verdict in this case.

As you know, your verdict must be unanimous. When you reach your jury room you will select a foreman to preside over the deliberations and when you have reached your verdict, please notify the marshal.

61 The alternate jurors may be excused.

* * * * *

[Filed April 21, 1958]

On this 17th day of April, 1958, came the attorney for the government and the defendant appeared in person and by counsel, Eugene Roberson, Esq.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of

VIO. Title 22, Section 3501a, D. C. CODE
as charged, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

One (1) year to Four (4) years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Edward M. Curran

United States District Judge

[Filed April 30, 1958]

MOTION

T 28 Sec 2255 U. S. C. A.

Comes now defendant Henry Wilson, who being duly sworn avers that deponent

was sentenced without due process of law - to a term of imprisonment of one to four years on a charge of "indecent act"; a misdemeanor that:

1. Deponent was not allowed witnesses in his behalf, in violation of Amendment VI of the Constitution (medical and other witnesses)
2. Counsel appointed by the Court did not defend deponent to the best of his ability.

NON SEQUITUR and contrary to the law of the land and the Bill of Rights.

WHEREFORE, deponent prays this Honorable Court to vacate and set aside sentence; appoint other capable counsel, according to the Constitution; and grant such other and further relief as is proper and appropriate in the premises.

Respectfully submitted,

/s/ Henry Wilson, Deponent

Subscribed and sworn to before me a Notary Public in the District of Columbia, this 22nd day of April, A. D. , 1958.

/s/ J. E. Ottes, Notary Public

HANDWRITTEN: (Was Mr. Burka's) The motion files and records conclusively show that defendant is entitled to no relief. Motion denied.

/s/ Curran, J. 4/30/58

[Filed June 26, 1958]

MOTION TO VACATE SENTENCE AND DISCHARGE DEFENDANT, OR, IN THE ALTERNATIVE, GRANT A NEW TRIAL

Title 28, Section 2255.

Comes now the defendant, Henry Wilson, in proper person, and moves that the Court vacate his sentence and discharge him from custody, or, in the alternative, grant a new trial.

Defendant was sentenced to a term of from one (1) year to four (4) years in the above case on 17 of April 1958 for the crime of "INDECENT ACT". Defendant states that he has been deprived of his liberty for more than eight months since his arrest, and more than three months since his trial, without cause and without DUE PROCESS OF LAW, as provided by the Fourth, Fifth, Sixth and

14th Amendment, based on a case where the evidence was inadmissible since it was in violation of our Constitution Bill of Right, and that he was with-

2 out effective assistance of counsel as provided by the Sixth Amendment.

Jurisdiction of this Court is invoked pursuant to the provisions of TITLE 18, SECTION 2255, U. S. CODE, and as grounds for his motion the defendant submits to the Court as follows:

Defendant was arrested on November 14th 1957 from a complainant by his wife, Mrs. Wilson that her husband was drinking and they had a quarrel and the wife Mrs. Wilson, left the house, angry because of her husband, Mr. Wilson, was drunk, and later in the night she, Mrs. Wilson, came back this about 10:00 P. M. same day, with two detectives, the detectives rouse the defendant, Mr. Wilson, from sleep, and asked him to come with them. The detectives carried the defendant, (Mr. Wilson) to No. 10 Precinct and was held until the next day, this being November 15, 1957. Then about 9:00 A. M. on this date defendant (Mr. Wilson) was transferred from No. 10 Precinct to Police Headquarters for a lineup. From here defendant was taken to the District Attorney's Office there defendant was questioned about an "indecent" act with his niece who defen-

3 and his wife had raised since she was 2 years old, she is now age 12 years. At the District Attorney's Office she was asked what happened between her and her uncle, she told the District Attorney and the detective that nothing had happened, and when asked if he, her uncle, had touched her she said "No". The child then was carried to another room and then the detective went in the room and told the child if she did not tell the District Attorney that the Defendant (Mr. Wilson), her uncle, was taken indecent action with her, he, the detective, would have her the child taken away from Mr. and Mrs. Wilson and have her put in a foster home, this put fear into the child and she begin to cry. The detective then told Mrs. Wilson the wife of the (Defendant) unless the child testified against her uncle the (Defendant) and repeated what he would tell her to say to the District Attorney he would see to it she Mrs. Wilson would not be able to keep the child this put words into the child mouth as to what to say, after this threat the child in fear and crying thereupon went back to the District Attorney and told him

4 what the detective told her the (child) to say to the District Attorney that her uncle (Defendant) had, had indecent action with her.

Defendant can establish the child was carried to Gallenger Hospital by the same detectives on the same night of the defendant arrest, and same night of the allege offense and there was examination by an doctor, to determine whether or not she had been tampered with the result of this examination showed negatived. She told the doctor no one had bothered her.

Defendant states he has an Constitution right to be re-heard on the following points of law.

Defendant was unnecessary detained and questioned in order to build up a case against him, and in violation of Rule 5A of the Federal Rules of Criminal Procedure. Defendant was held more than 13 hours without being told of charge against, and without any attempt to be brought before an magistrate for a hearing. See Akowskey and Watson v. Unites States Mallory v. United States. Justice Frankfurter wrote that police are to take the men they arrest to a magistrate "as quickly as possible," It does not mean he added that they can take them to Police Headquarters to question them although they can take them there to book them "Only".

5

TITLE 28, RULE 5a

Appearance before the Commissioner, an officer making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available Commissioner or before any other nearby office empowered to commit a person charged with offense against the law of the United States, when a person arrested without a warrant is brought before a Commissioner or other office, a complaint shall be filed forthwith. (sic).

The Commissioner shall inform the defendant of the complaint against him and his constitution rights (see also 33 U. S. C. 436, 446; 46 U. S. C.

Defendant states that he was ineffectually represented by counsel, defendant had been drinking heavily on the day of the alleged offense. Defendant informed counsel of all facts, but counsel failed to explore a defense. The Court has

6

said in many occasions that effective assistance of counsel depends as much on counsel being thoroughly prepared through research and consultation as on his presence at trial.

Motion for a new trial or to vacate sentence under Title 28, Section 2255 on the following facts and is grounds for his motion under our Constitution Bill of Rights.

- | | | |
|--------|---|--|
| First | - | Arrest was without probable cause. |
| Second | - | Unnecessary detention after arrest before arraignment. |
| Fourth | - | Defendant was deprive of due process of law. |
| Fifth | - | Defendant was deprived of an adequate defense and Constitutional rights. |
| Six | - | Conspiracy was use against the defendant. |
| Seven | - | Error of law. |
| Eight | - | Error of Facts. |
| Ninth | - | Newly Discovery Evidence. |

Defendant has a constitution legal rights to be heard on this Court and to present his allegation, as Congress has said and is law every accused person is entitled to his constitution rights, Congress claiming the right to be released

7 upon the grounds that the sentence was imposed in violation of the Constitution or law of the United States, or in otherwise subject to collateral attack, may move the Court which imposed the sentence to vacate, set aside or correct the sentence. A motion for such relief may be made at any time, the denial or infringement of the Constitution rights of the defendant as to render the judgment vulnerable to collateral attack. This Court should vacate and set the judgment aside, or grant defendant a new trial, or correct the sentence as may appear appropriate, after defendant motion is heard. This case should be reviewable as such. Ch. 139, 646, 1, 62 Stat. 964. Ch. 139, 111, 63 Stat. 105.

2202 - After reasonable notice and a hearing against the adverse party who rights have been determined by such judgment Ch. 646, 1, 62 Stat. 965, Eff. Sept. 1, 1948.)

The production of the defendant at the hear ing is in conformity with Walker v. Johnson, 1941, 61 S. Ct. 574, 312 U. S. 275, 85 L. Ed. 830.)

Title 28, Ch. 153, Secdion 2201, This Court has a right to declare the right and other legal relief as the Court may determine reviewable. Ch. 139,

646, 1, 62 Stat. 964. Ch. 139, 111, 63 Stat. 105.)

Moreover, where the Constitution rights of the accused are involved the invocation of this Court's discretion under Title 28, Section 2255 is particularly appropriate.

CONCLUSION

For the foregoing reasons the conviction of the defendant should be heard, in open court to determine the defendant allegations.

PRAYER

Wherefore, defendant prays the Court will grant him a prompt hearing, to determine the issues and make a finding of fact and conclusions of law in his case, and will vacate his sentence and discharge him forthwith or, in the alternative, grant a new trial, and any other such relief as may be to the Court appropriate.

/s/ Henry Wilson

(Petitioner)

Subscribed and sworn to before me this 24th day of June, 1958.

/s/ Edward J. Keightley, Jr.

Notary Public

My Commission Expires December 18, 1961.

[Filed August 19, 1958] - Handwritten on first page of preceding MOTION.

Denied - /s/ Curran, J. August 18, 1958.

[Filed September 2, 1958]

Henry Wilson, Appellant vs. United States of America, Appellate

AFFIDAVIT IN SUPPORT OF APPLICATION FOR LEAVE TO PROCEED WITHOUT PREPAYMENT OF COSTS

of 8-19-58

app. denial of mo. to vac. sen., etc.

I, Henry Wilson, being first duly sworn according to law, depose and say that I am the appellant in the above entitled cause, and, in support of may application for leave to proceed in said cause without being required to prepay fees or cost, state as follows:

1. That I am a citizen of the United States.
2. That because of my poverty I am unable to pay the said costs of said suit or action.
3. That I am unable to give security for the same.
4. That I believe I am entitled to the redress I seek in said suit or action.
5. That the nature of my cause of action is briefly stated as follows:
I was convicted of the crime of indecent liberties and sentenced to serve a term of 1 to 4 years.

On February 4, 1958, appellant was tried and found guilty of the charge by a jury. On April 17, 1958 was sentenced to a term of 1 to 4 years.

On June 26, 1958, appellant filed a motion to the trial court to vacate the judgment, or in the alternative grant him a new trial, on August 19, 1958, appellant received a notice from the Clerk of Court that appellant's motion was denied by Judge Edward M. Curran on August 18, 1958, did not receive an order from the Court signed by the Judge nor any statement as to the grounds as to why said motion was denied, the District Attorney did not file an opposition, either for or against appellant's motion.

/s/ Henry Wilson

Henry Wilson, Appellant

Subscribed and sworn to and before me this 26th day of August, 1958.

/s/ Edward J. Keightley, Jr.

Notary Public

My Commission Expires December 18, 1961.

Let the appellant proceed without prepayment of costs.

(Unsigned)

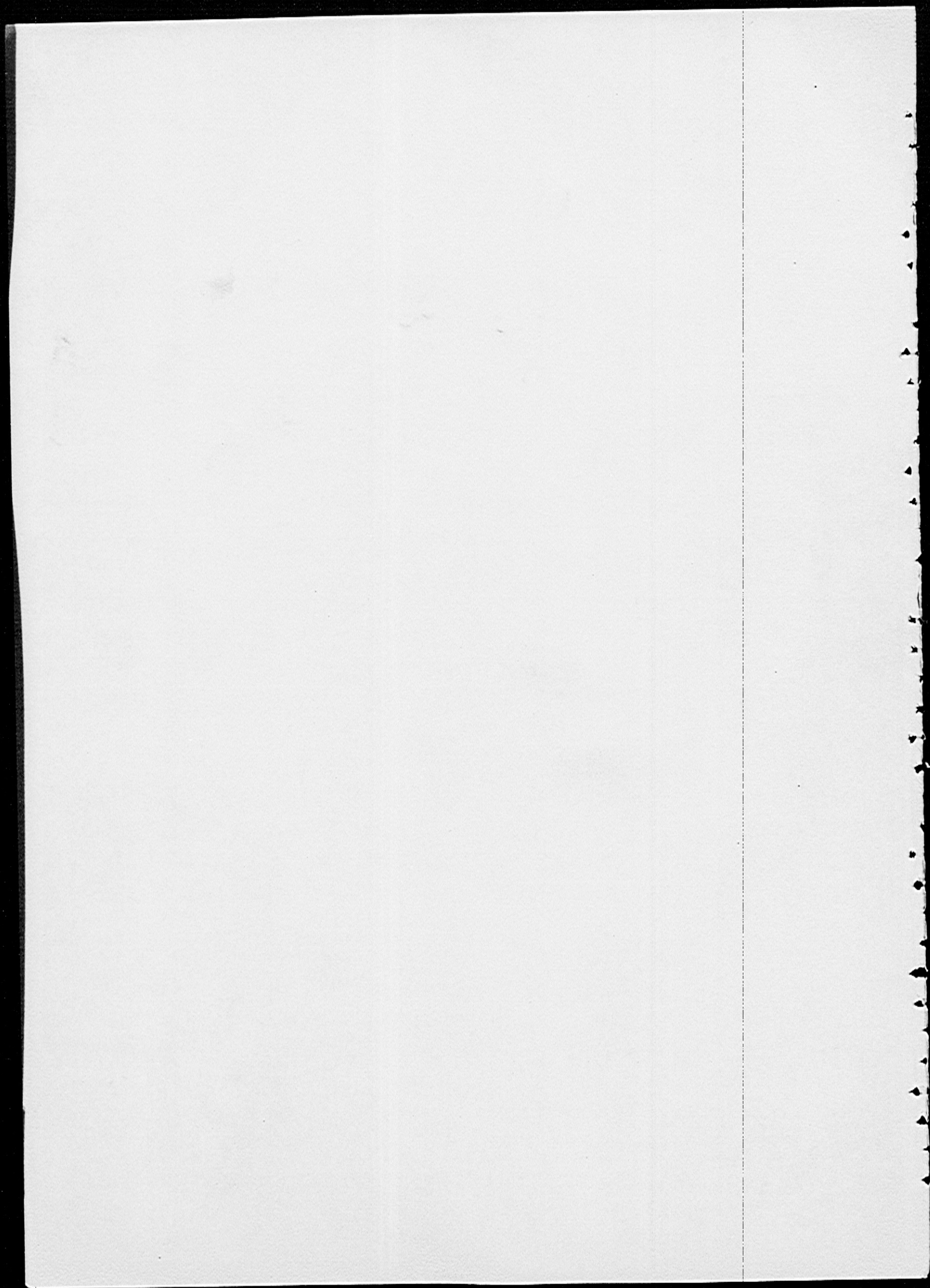
JUDGE

[Filed October 1, 1958] - Handwritten on first page of preceding affidavit.

Denied, not taken in good faith.

/s/ Curran, J.

October 1, 1958.



BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Docket No. 15,102

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED MAY 25 1959

Joseph W. Stewart
CLERK

HENRY WILSON,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

~~7~~86

Appeal From a Judgment of the
United States District Court For The District of Columbia

Neil N. Bernstein
1735 DeSales Street, N.W.,
Washington 6, D.C.

Counsel for Appellant
Appointed by this Court

STATEMENT OF QUESTIONS PRESENTED

1. Whether, in a trial on an indictment for taking indecent liberties with a minor child, the District Court should grant a motion for judgment of acquittal where the only evidence to prove the offense charged was the uncorroborated testimony of an eleven-year old girl.

2. Whether a conviction for taking indecent liberties with a minor child should be reversed for failure of the trial judge to instruct the jury that it could convict appellant only if the story of the complaining witness was corroborated by credible evidence in all material respects.

3. Whether the wife of the accused in a criminal case may testify against him over his objection.

4. Whether the District Court must hold a hearing on a motion filed by a prisoner, pursuant to 28 U.S.C. §2255, alleging that the complaining witness at his trial had been coerced by the Government to give false testimony against him.

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JURISDICTIONAL STATEMENT

Appellant was convicted in the United States District Court for the District of Columbia of violating D.C.Code §22-3501(a). Subsequent thereto, his motion to vacate that judgment, pursuant to 28 U.S.C. §2255, was denied by that court. This Court has jurisdiction upon appeal to review both judgments under 28 U.S.C. §1291.

STATEMENT OF CASE

A. Proceedings

Appellant was indicted on December 17, 1957, in a one count indictment charging him with violation of D.C.Code §22-3501(a). (J.A. p.4) Appellant pleaded not guilty at arraignment (J.A. p. 4) and, on his forma pauperis application, Eugene Roberson, Esq., was appointed by the trial court to represent him. Appellant was tried before a jury on February 4, 1958, which found him guilty as charged. On April 17, 1958, appellant was sentenced to serve a prison term of from one to four years. (J.A. p. 34).

Less than ten days thereafter, on April 23, 1958, appellant filed with the trial court a pro se document attacking his conviction, which document was denominated "Motion T28 Sec. 2255 USCA." That document asked that appellant's sentence be vacated and set aside, capable counsel be appointed and for "such other and further relief as is proper and appropriate in the premises." On April 30, 1958, appellant's "motion" was denied by the trial judge without hearing on the ground that the "motion, files and records conclusively show that the petitioner is entitled to no relief." (J.A. pp. 34-35).

On June 26, 1958, appellant filed with the trial court a motion to vacate his sentence and discharge him or, in the alternative, grant a new trial. The motion was denied without hearing on August 18,

1958. (J.A. pp. 35-39). Appellant's application to appeal in forma pauperis was similarly "denied, not taken in good faith" on October 1, 1958. (J.A. p. 40).

Appellant, on October 17, 1958, filed a petition in this Court seeking to appeal the trial court judgment in forma pauperis. (Misc. 1127). By order of this Court dated December 9, 1958, the petition was held in abeyance and counsel was appointed to file a memorandum in support thereof. That order stated, "Counsel is requested to include in the memorandum comment directed to whether petitioner is before this court on direct appeal from the judgment of conviction as well as matter regarding the attempt to appeal from the denial of petitioner's motion to vacate sentence."

The memorandum in support of the petition was filed in this Court on March 23, 1959. Attached to the memorandum were affidavits of appellant and his appointed trial counsel stating that appellant had not been made aware, at his trial or sentencing, of his right to appeal to this Court or the proper procedure for doing so. Contemporaneously therewith, appellant filed a motion in this Court seeking an extension of time to file the record and docket the direct appeal from his conviction, time having expired.

By order of this Court dated March 30, 1959, appellant's motion for extension of time to docket the direct appeal was granted. By order of this Court dated April 20, 1959, appellant was "allowed to proceed on appeal without prepayment of costs from the judgments of the District Court entered April 17, 1958 and August 18, 1958." The record on appeal was filed in this Court on April 29, 1959.

B. Facts

The following evidence was introduced at appellant's trial:

1. Clara Lee Gardner. The first witness was the eleven-year old

niece of appellant. After her competency as a witness had been determined, she testified that she lived with petitioner and his wife, sleeping in a small bed in their bedroom. (J.A. p. 8). She stated that on the evening in question petitioner came home about ten o'clock, told his wife to get him some coffee and told Clara Lee to get in bed with him. 1/ (J.A. pp. 9-10).

Defendant then told her to take off her shoes and panties. 2/ (J.A. p. 10). The witness testified that appellant then "got on top" of her and "started working up and down" for what she thought was "a long time." Under questioning by the court, she acknowledged that petitioner was wearing his undershirt and shorts at the time and his private parts were not exposed. (J.A. pp. 10-11). Clara Lee said petitioner had "done this before" around four times, but she did not tell anyone because defendant threatened to kill her. (J.A. pp. 11-12).

2. Alice Wilson. The government called defendant's wife as the next witness. When informed of her privilege not to testify, she declined to take the stand. (J.A. p. 13).

3. Grisby B. Southcomb. The prosecution concluded with the testimony of Police Officer Southcomb. He stated that he went into appellant's bedroom just under two hours after the alleged sexual events occurred, accompanied by Mrs. Wilson and Clara Gardner. 3/ In appellant's bedroom, Southcomb found appellant in bed in his underpants, outer shirt, and sox, and, he claimed, Clara Gardner standing alongside the

1/ Originally, Clara Lee stated that defendant told her "to get into my aunt's bed." (J.A. p. 10). However, later in the trial she admitted she had been sleeping in the large bed with petitioner and his wife for some three months prior to the evening involved. (J.A. p. 22).

2/ It is not shown in the transcript whether this left the witness wearing any other clothes, day or night clothes, or naked. Later in the record, she is described as "dressed in a slip" (J.A. p. 14). Whether she put the slip on after the events testified to, or took other clothes off down to the slip, does not appear.

3/ Southcomb's exact words were that he was "in the company of Mrs. Wilson and the complainant." It is clear that Southcomb considered the complainant to be Clara Gardner. (J.A. p. 14).

bed in her slip. 4/ Petitioner was arrested, booked for "investigation" and questioned the next morning. Southcomb stated that, based on his experience, petitioner was not intoxicated when arrested. (J.A. pp. 14-15). The Government stipulated that medical examination found Clara Lee's hymen intact and no evidence of penetration. (J.A. pp. 15-16). At this point, the prosecution rested and the defense moved for judgment of acquittal, based on denial of due process. failure to prove intent, and insufficiency of the evidence. The motion was denied. (J.A. p. 18).

4. Charles Wilson. The first defense witness (no relation to appellant) testified that on the day in question, he and defendant had been drinking together from 5:30 in the evening until nine o'clock, when defendant went home. The witness stated that defendant left for home "intoxicated" and "in pretty bad shape." (J.A. pp. 18-20).

5. Clara Lee Gardner. (Recalled as a defense witness) She modified her earlier statement and admitted that she had been sleeping in the same bed as petitioner and his wife from the summer until the date of the alleged offense, November 14. (J.A. pp. 22-23).

6. Henry Wilson. Petitioner testified in his own behalf. He stated that he had raised Clara Gardner since she was two years old and loved her and treated her as his own child. He vigorously denied ever having taken any liberties with, or laying a hand on her. He testified that on the evening in question, he was so intoxicated that he remembered nothing from the time he arrived home until the police arrested him. Appellant stated that at police headquarters Clara Gardner denied that defendant had touched her until a policeman took her aside and talked to her. (J. A. 23-27).

The defense then rested.

4/ The inconsistency between this and Southcomb's statement that Clara accompanied him into the bedroom is obvious.

7. Alice Wilson. The prosecution called defendant's wife as a rebuttal witness, over defendant's objection. She testified only that when defendant came home on the night in question, "[h]e was pretty liquored up but he wasn't drunk." (J.A. pp. 28-29).

STATUTES AND RULES INVOLVED

Section 2255, Title 28, United States Code:

§2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Section 3501(a), Title 22, District of Columbia Code:

"Any person who shall take, or attempt to take any immoral, improper or indecent liberties with any child of either sex, under the age of sixteen years with the intent of arousing, appealing to, or gratifying the lust or passion or sexual desires, either of such person or of such child, or of both such person and such child ... shall be imprisoned in a penitentiary, not more than ten years."

Section 306, Title 14, District of Columbia Code:

"In both civil and criminal proceedings, husband and wife shall be competent but not compellable to testify for or against each other."

Rule 52(b), Federal Rules of Criminal Procedure:

"Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

STATEMENT OF POINTS

1. Conviction for the offense of taking indecent liberties with a minor child should never be allowed where the only evidence of occurrence of the crime and identity of the perpetrator is the uncorroborated testimony of a minor complaining witness.

2. In the instant case, the testimony of the complainant as to the offense and the offender is totally uncorroborated.

3. Even if any other evidence may be considered corroborative, the failure of the trial judge to charge the jury on the question of corroboration, so that the jury could determine whether the testimony of the complainant was corroborated by credible evidence, was reversible error.

4. A wife may not testify against her husband over his objection in a criminal case in which he is the defendant.

5. The trial court erred by refusing to hold a hearing on an allegation in a motion to vacate a judgment of conviction that the conviction was obtained by knowing use of perjured testimony.

SUMMARY OF ARGUMENT

In the District of Columbia, a person cannot be convicted of any serious sexual offense on the uncorroborated testimony of a complaining witness. Because of the serious social stigma that attaches to accusation of sexual misbehavior, indictment should be deterred in any but very strong cases. Further, the accused has a heavy burden in proving his innocence of sexual guilt. Moreover, a high percentage of accusations of sexual violations are false.

By the same reasoning, a conviction for taking indecent liberties with a minor child should not rest on an uncorroborated complaint. Community disapproval of an accused child molester is as great as disapproval of the rapist, homosexual or pervert. He has the same heavy burden of proof as a defendant in any trial for another serious sexual offense. And the accusation of sexual transgression by minor children against adults have been demonstrated to be most unreliable.

In the instant case, the accusation of the complainant is uncorroborated as to either the corpus delicti or the identity of the accused. The fact that appellant was in his own bed two hours after the events testified to by the complainant is no corroboration. Nor is there any corroboration of her charge elsewhere in the record.

Assuming, arguendo, that any other evidence could be considered corroborative, it was error for the trial court to fail to instruct the jury on the question of corroboration. The jury should have been instructed that it could convict appellant only if the accusation of complainant was corroborated in all material respects by evidence

believed by the jury to be true. Otherwise, the jury could refuse to believe the corroborative testimony but convict appellant only on the bare story of the complaining witness. This would unduly limit the protection of the corroboration requirement.

The trial court erred in permitting appellant's wife to testify against him over his objection. The common law privilege of a party to prevent adverse testimony by his spouse has not been abrogated by Congress. Its importance and validity in federal cases has been recently recognized by the Supreme Court. Inclusion of the testimony of appellant's wife, an outright denial of his defense, was not harmless error.

If the conviction is not reversed, the case should be remanded for a hearing on appellant's motion to the trial court to vacate his conviction. Appellant alleged that his conviction was based on knowing use of perjured testimony. That allegation is not contradicted anywhere in the record. The motion should not have been denied without a hearing.

ARGUMENT

By the orders of this Court dated March 30 and April 20, 1959 in appellant's proceeding for leave to appeal in forma pauperis (Misc. 1127), the pleading filed by appellant with the trial court on April 23, 1958 has been construed to be a timely and sufficient notice of appeal from the judgment of his conviction. Therefore, in light of the fact that this appeal was docketed and the record filed within the time allowed in the order of March 30 for docketing the direct appeal, the instant proceeding is a direct appeal from the judgment of conviction as well as an appeal from the trial judge's denial without hearing of appellant's motion to vacate the judgment, filed pursuant to 28 U.S.C. §2255.

- I. The conviction should be reversed for failure of the trial judge to grant appellant's motion for judgment of acquittal.
- A. This court has consistently required corroboration of the testimony of a complaining witness to support convictions for sexual offenses.

At the common law, a defendant could be convicted of any sexual crime on the uncorroborated testimony of the complaining witness alone. However, this has not been true in the District of Columbia. This Court has consistently held that all of the "so-called sex offenses" lie "in a field in which our courts have traditionally been unusually skeptical toward the accusation." Kelly v. United States, 90 App.D.C. 125, 128, 194 F. 2d 150, 153 (1952). Corroboration has been required to support convictions for rape, 1/ seduction, 2/ invitation to sodomy, 3/ and sexual assault. 4/

There are a number of sound policy reasons for requiring high standards of proof in offenses of a sexual nature. In the first place, it cannot be doubted that serious social stigma attaches to anyone who is even indicted for flagrant anti-social sexual conduct. If a case could stand on the statement of one disgruntled person, a threat to press an accusation of sexual offense could be a potent weapon for blackmail. The knowledge that an accusation, and that alone, could compel one to stand trial and risk possible conviction as a rapist or pervert would compel many men to pay the accuser money for silence. Therefore, there is a strong public interest in deterring prosecution in dubious cases by requiring a sound foundation before charges of this kind can be preferred.

1/ Walker v. United States, 96 App.D.C. 148, 223 F. 2d 613 (1955); Ewing v. United States, 77 App.D.C. 14, 135 F. 2d 633 (1942); Kidwell v. United States, 38 App.D.C. 566 (1912).

2/ Bray v. United States, 39 App.D.C. 600 (1913).

3/ Kelly v. United States, 90 App. D. C. 125, 194 F. 2d 150 (1952)

4/ Guarro v. United States, 99 App.D.C. 97, 237 F. 2d 578 (1956).

Secondly, the burden on an accused defending against a sexual charge is a heavy one. Sexual crimes are rarely alleged to have occurred in the presence of third parties. Whether true or false, the charge of the prosecutrix is almost always that certain acts were committed while she and the defendant were alone together. If she picks a time when the defendant was not observed by third parties, he can offer no defense but his outright denial. And the respect and sympathy usually felt for any wronged female gives undue weight to her tale if it is slightly plausible. The ease with which an innocent man can be condemned by a jury under these circumstances has been recognized by the courts since at least 1680. 5/

A third reason for requiring corroboration of the testimony of the complaining witness before conviction of sexual crime can be sustained is the great number of false accusations made by females against innocent men. This is nothing more than judicial recognition of accepted scientific fact. In addition to those who would deliberately fabricate out of motives of spite or revenge, there is an unusually large number of women who are psychologically motivated to translate fantasies of sexual transgressions against themselves into actual belief and memory falsification. Dean Wigmore has examined and collected a large number of psychiatric studies of females who have falsely accused men of sexual offenses. 3 Wigmore, Evidence §924(a) (3d ed. 1940). Their accusations are the products of unbalanced minds, finding satisfaction through the narration of imaginary sexual incidents in which the narrator is the heroine. Wigmore points out that these fantasies are usually put forth in an honest and convincing manner, making their potential for harm even greater. Wigmore

5/ "It is true, rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered that it is an accusation easily to be made and hard to be proved; and harder to be defended by the party accused, though never so innocent."

Hale, L. C. J., Pleas of the Crown, I, 633, 635, quoted in 7 Wigmore, Evidence §2061 (3d ed. 1940).

supports his views by the conclusion of the report of the American Bar Association 1937-38 Committee on the Improvement of the Law of Evidence. That report states that psychiatrists unanimously recognize the danger of possible mental delusions and distortion of the imagination of complaining witnesses in sexual cases, and concludes:

"The warnings of the psychiatric profession, supported as they are by thousands of observed cases, should be heeded by our profession."

A recent work on the relation of the psychiatric and legal professions emphasizes the persistent recurrence of the same phenomenon.^{6/} The authors point out that women frequently have fantasies of being sexually molested. In the mentally unbalanced female, the line between the imaginary and reality may be blurred and these fantasies are converted into actual belief.

Conviction of the innocent on fallacious testimony of this nature has been minimized by requiring corroboration of the complainant's testimony. In an analogous situation, this Court has insisted upon corroboration of extrajudicial confessions, because of the "real danger of false confessions, coerced or psychopathic." Forte v. United States, 68 App. D.C. 111, 94 F. 2d 236 (1937). Dean Wigmore disputes the merit of a requirement of corroboration for the testimony of a sex crime complainant, ^{7/} but only because he feels psychiatric examination of every prosecutrix would be a better test of veracity. ^{8/} Although psychiatric evaluation can be an excellent form of corroboration, appellant feels it should not be mandatory in every sexual case and could be dispensed with where there is credible material corroboration of the corpus delicti and the identity of the accused. But corroboration of some type should be a mandatory part of the prosecution's case.

^{6/} Guttmacher & Weihofen, Psychiatry and the Law 375 (1952).

^{7/} 7 Wigmore, Evidence §2061 (3d. ed. 1940).

^{8/} 3 Id. §924a.

B. The same reasoning compels a conclusion that an accused should never be convicted for taking indecent liberties with a minor child on the uncorroborated testimony of the complaining witness

Under the criteria thus established by this Court, a conviction for taking indecent liberties with a minor child should not be permitted to rest on the uncorroborated testimony of a minor complaining witness.

There can be no doubt that severe social harm results to any person from an accusation that, in order to satisfy his lust or passion, he has resorted to the molestation of children. As this Court has pointed out, "this is a repellant charge." Jones v. United States, 97 App.D.C. 291, 231 F. 2d 244, 246 (1956). Without attempting to categorize various sexual offenses by degrees of social revulsion, it is reasonable to conclude that an accusation of corruption of the innocence of youth is at least as offensive to society as a charge of rape, homosexuality or perversion. Protection of the innocent from possible blackmail and social ostracism should extend to this class of crimes as well.

Nor is the ease of defense any less for the accused child molester. Because an indecent liberty involves neither penetration or ejaculation, the accusation cannot be medically verified or refuted. Against the story of the small child, the defendant can offer only repeated denial. And this bare denial does little to counteract the effect of the supposed innocent honesty of a child and the fact that he has been accused, arrested and indicted for molesting children. As a California court has wisely observed: 9/

"Notwithstanding the salutary rule that an accused is presumed to be innocent until his guilt has been established beyond a reasonable doubt, nevertheless, to the mind of the average citizen or juror, the mere fact that a person has been accused of the commission of such an offense seems to constitute sufficient evidence to warrant a verdict of guilty, and . . . in order to secure an acquittal of the charge, it becomes incumbent upon the accused to completely establish his innocence . . . beyond a reasonable doubt."

9/ People v. Adams, 14 Cal. 2d 154, 93 P. 2d 146, 152 (1939).

However, the most important reason for requiring corroboration of a charge of taking indecent liberties with a minor child is the fact that the testimony of a complaining minor that she has been sexually molested presents the greatest potential for falsified testimony. The 1937 ABA Committee report (set out in 3 Wigmore, supra) emphasizes that the possibility of mental or moral delusion of a complainant female is greatest in young girls. Guttmacher and Weihofen state: 10/

"It is well recognized that children are more highly suggestible than adults. Sexual activity, with the aura of mystery that adults create about it, confuses and fascinates them. Moreover, they have, of course, no real understanding of the serious consequences of the charges they make. As a consequence most courts show an admirable reluctance to accept the unsubstantiated testimony of children in sexual crimes."

The psychiatric studies set out by Dean Wigmore (see supra) arrive at identical conclusions and give repeated illustrations of instances where minor children, with convincing sincerity and credibility, made absolutely unfounded sexual charges against strangers and friends alike. The studies also show a strong tendency to level the charge against the minor's father or one in the father's position, in response to the Electra sex-wish.

Thus, it is clear that the crime of taking indecent liberties with minor children presents a situation where the interests of justice should preclude allowing convictions solely on the testimony of a minor child. The crime is sufficiently heinous that publicity and prosecution should be avoided in any but the strongest cases. And, due to natural prejudice and problems of proof, the complaint of any child has a disproportionate tendency to result in conviction. Yet, psychiatry has concluded, after many years of observation, that complaints of this nature are precisely the most likely to be fallacious. It cannot be argued that the normal witness' oath and a determination of the understanding of that oath by the complainant is a sufficient safeguard of veracity. The problem in this class of cases is,

10/ Op. cit. supra n. 6 at 374.

not only that the witness may have told a deliberate lie, but that the witness herself has falsified her memory and accepted fantasy as reality.

Requiring corroboration of the complainant's charge of the perpetration of an indecent liberty upon her would not be a deterrent to prosecution where the accusation is bona fide. Even if there are no eye witnesses and no medical verification, the prosecution can meet its burden by having the complainant examined by a psychiatrist and using his conclusion on her awareness of reality, if favorable, as corroboration. The cost of such examination is negligible when balanced against the liberty of the defendant. Moreover, even in terms of dollars and cents, it is cheaper for the Government to have a witness psychoanalyzed than to pay the cost of keeping an innocent man in prison for ten years.

C. The testimony of the minor complainant witness in the instant case is uncorroborated

The transcript of record of appellant's trial reveals no evidence that can be considered as corroboration of the testimony of the eleven-year-old complaining witness, Clara Lee Gardner.

The only other evidence offered in the Government's direct case was the testimony of Police Officer Southcomb. This witness had no knowledge of any events relevant to this case before 11:40 p.m., which is almost two hours after the alleged molestation of the complainant. And, the only thing he could testify to as occurring at that time is that appellant was in his own home in his own bed. Officer Southcomb's statement that Clara Gardner was in the room with appellant when Southcomb entered should be disregarded because of its patent inconsistency with Southcomb's earlier testimony that Clara Gardner accompanied him into the room. (J. A. p. 14). Further, even if it be not disregarded, it lends no corroboration to the complainant's story. There is nothing to suggest the occurrence

of any unusual event in the fact that an eleven-year-old girl is found at almost midnight one night in her bedroom dressed for bed. There is absolutely no connection between this and any possible sexual molestation that may have occurred earlier.

Nor is her story buttressed by the testimony of appellant, his witnesses, or the rebuttal witness. Charles Wilson testified only to appellant's intoxication on the evening in question (J. A. pp. 18-22). Appellant himself specifically denied ever having "fooled" with the complainant (J. A. p. 26) which was supported by Southcomb's testimony that at police headquarters appellant denied any guilt (J. A. p. 17). It is true that appellant admitted on cross-examination that he was in an alcoholic stupor when the offense supposedly was committed and that he could not account for his physical movements. However, he did specifically deny any intentional physical contact with the complainant at that time (J. A. p. 27). In terms of the crime involved and its requirement of specific intent, this testimony constitutes a denial of the charge. Such consistent denial of an offense can not be considered as corroborative of its occurrence.

The corroboration required is corroboration of the truth or trustworthiness of the testimony of the witness. 11/ Evidence, such as Officer Southcomb's testimony, that the accused was subsequently found where he might have been if the complaint were truthful is insufficient corroboration where there is an otherwise valid explanation for his presence at the time and place in question. 12/ In this case, the presence of a working man in

11/ Cash v. United States, D.C. Cir. No. 14,642 (January 22, 1959). See Walker v. United States, 223 F. 2d 613, 620 (D.C. Cir. 1955) (dissenting opinion). Judge Bazelon and the majority agreed on the degree of corroboration required in a sexual offense, but disagreed on the nature of the evidence presented in that case. See also, authorities cited by Judge Bazelon, and United States v. Neff, 212 F. 2d 297, 308 (3d Cir. 1954).

12/ Kelly v. United States, 90 App.D.C. 125, 194 F.2d 150 (1952); Annotation, 60 A. L. R. 1124, 1144 (1929); Note, 30 Michigan L. Rev. 1291, 1300 (1932).

his own bed shortly before midnight during the work week can be explained consistent with his innocence of sexual molestation and in no way suggests possible guilt. There is nothing to corroborate the complainant on the only material issue in the case, whether an offense had been committed. Her testimony is not supported by either other material proof of the accusation or proof of her trustworthiness.

Thus, the conviction before this Court rests solely on the testimony of an eleven-year-old girl. The record shows that she did not testify consistently on the basic fact of where she slept on the night in question but stated first that she occupied the small bed by herself (J. A. p. 8) and later that she slept in the large bed with appellant and his wife (J. A. p. 22). The record also showed that she had lived with appellant and his wife since she was a baby (J. A. p. 26) and had slept in the same room and same bed with them for at least three months prior to the evening in question (J. A. p. 25). This sleeping arrangement could reasonably have given Clara Gardner sufficient observation of sexual behavior to enable her mind consistently to develop a fantasy such as the story she related on the stand. Further, there is the uncontradicted testimony of appellant that the complainant at first denied being molested and changed her story only after a policeman took her aside and spoke with her privately. 13/ (J. A. pp. 26-27).

When all these circumstances are added to the verified conclusions of psychiatrists as to the propensities of young girls of this age to create and believe fantasies of this nature, the only reasonable conclusion is that the testimony of Clara Gardner is not sufficiently reliable to justify depriving appellant of his liberty. Because of the failure of the prosecution to corroborate this testimony in any material respect, the conviction cannot stand.

13/ For the conversation that appellant believes to have taken place between the policeman and Clara Gardner, see J. A. pp. 36-37.

II. It was error for the trial judge to fail to instruct the jury on the question of corroboration

Even assuming, arguendo, that some evidence at appellant's trial might be considered as corroboration of the testimony of Clara Lee Gardner, appellant's conviction should be reversed for failure of the trial judge to instruct the jury that it could convict appellant only if it believed the complainant's testimony was corroborated by credible evidence.

The only instruction given on Clara Gardner's testimony was as follows:

"Now the child, Clara Gardner, you should scrutinize, of course, carefully the testimony of a girl of ten years old (sic). It doesn't mean you should disregard or disbelieve her testimony but you should consider it carefully." (J. A. p. 33).

This instruction is clearly deficient. The function of the trial judge is limited solely to a determination of whether sufficient evidence exists which, if believed by the jury, would corroborate the story related by the complainant. But it is the jury, and only the jury, which could decide whether or not to believe the corroborative evidence. Without a proper instruction in this regard, the jury could well have disbelieved any possible corroboration but convicted appellant anyway solely on the complainant's story. The sufficiency of the corroboration must be passed on by both the judge and the jury. 14/

In order for the jury to properly perform its function, it must be apprised of its duty by proper instruction. It would be inconsistent to require corroborative evidence to prove the reliability of some evidence and then hold that the evidence can be believed even if the only proof of

14/ State v. Mueller, 202 Iowa 1067, 208 N.W. 360 (1926); People v. Adams, 72 App. Div. 166, 76 N.Y.S. 361 (1902); People v. Randall, 133 Mich. 516, 95 N.W. 551 (1903); Cofer v. State, 163 Ga. 878, 137 S.E. 378 (1927).

its reliability is rejected. The function of the requirement of corroboration would be unnecessarily limited thereby.

It was error for the trial judge to omit an instruction to the jury requiring belief of the corroborative testimony before a conviction could be based on the evidence presented by complainant. This error is of sufficient prejudice to the defendant to warrant notice by this Court even though not called to the attention of the trial court. 15/

III. The trial court erred in permitting appellant's wife to testify against him over his objection

At appellant's trial, the Government called appellant's wife as a rebuttal witness. Appellant's counsel immediately interposed an objection to receipt of her testimony. The trial judge, without giving appellant an opportunity to state the grounds for his objection, allowed his wife to testify in rebuttal (J. A. p. 28). This was a violation of appellant's common law privilege to bar adverse testimony by his spouse and invalidated his conviction. It cannot be claimed that the erroneous admission of her testimony was harmless error. The defense at trial was intoxication, which would be a complete defense to the crime charged which required a specific intent. Appellant's wife was the only adult witness with prior knowledge of his conduct. She contradicted his defense by stating, "he was pretty liquored up but he wasn't drunk." (J. A. p. 28). The jury could well have disregarded Clara Gardner's conclusion that appellant was not intoxicated (J. A. p. 12) because of her youth and lack of experience. Officer Southcomb's testimony on appellant's sobriety (J. A. p. 15) did not contradict appellant because Southcomb did not observe appellant until almost two hours after the crucial time. Therefore, it is reasonable to conclude that the jury rejected appellant's defense solely because the trial judge erroneously permitted his wife to rebut that defense over his objection.

Some time in the sixteenth century, the English courts established the rule that one spouse could not testify against the other without the latter's consent. 16/ By the seventeenth century, a spouse of a party became absolutely incompetent to testify for or against the party. This resulted from a combination of two common law doctrines: (1) the absolute disqualification of any party in interest to appear as a witness, and (2) the fact that husband and wife were one person in the eyes of the law. 17/ This was an absolute disqualification and not a privilege; it did not have to be asserted and it could not be waived. For as long as this disqualification persisted, the privilege of a party to bar adverse testimony by his spouse was never invoked. However, it was never distinctly abrogated and therefore remained a part of the common law.

Congress, by enacting what is now D.C. Code §14-306, has specifically removed the disqualification of a spouse as a witness. The only question which remains is whether that statute must be held to have abolished the pre-existing privilege of a party to bar unfavorable testimony from his spouse as well.

The wording of Section 14-306 does not support a conclusion that it was intended to abolish this privilege. That statute reads:

"In both civil and criminal proceedings, husband and wife shall be competent but not compellable to testify for and against each other."

It is clear that this statute intended to, and did, remove the common law incompetency of the spouse of a party. However, by specifically stating that the spouse is "not compellable," Congress also showed an awareness of the special status of the spouse of a party and an intent to continue that status as it existed before spouses became incompetent generally. The

16/ 7 Wigmore, Evidence §2227 (3d ed. 1940)

17/ See the statement of Sir Edward Coke quoted in Wigmore, supra n. 16; Annotation, 2 LRA (NS) 862 (1905)

statute made no attempt to define or limit the scope of the husband and wife privilege.

After passage of Section 14-306, then, a spouse of a party returned to the role she had occupied before the seventeenth century, that of a privileged witness. And the privilege in the District of Columbia after removal of the spouse incompetency is the privilege as it existed at the common law. *Halback v. Hill*, 49 App. D.C. 127, 261 Fed. 1007 (1920).

At the common law, the privilege to prevent the testimony of the spouse of a party belonged to both the party and to the witness. The reasons for the privilege are two-fold: First, there is a deep-seated feeling that it is repugnant to our moral standards for an accused to be condemned by his own wife or for a wife to become the instrument of her husband's condemnation; such conduct "will ordinarily rankle as treachery." *United States v. Walker*, 176 F. 2d 564, 568 (2d Cir. 1949). The second reason is that the privilege is necessary to preserve the institution of marriage, which as a policy matter is basic in our society. The courts have recognized that periods of marital discord will develop, which discord is neither permanent nor lasting. During such a period, a spouse may ill-advisedly and rashly condemn her husband and then regret her action and desire reconciliation. However, once she has violated the essential harmony and confidence of the marriage by condemning her spouse, reconciliation becomes impossible. It is clear beyond necessity for elaboration that the policy of this privilege can be effectuated only if the privilege is allowed to continue as a privilege of both the party and the possible witness. 18/

The privilege of a husband to be secure from condemnation by his wife has continued vitality and purpose today. As one commentator has noted: 19/

18/ *Hawkins v. United States*, 358 U.S. 74, 77-78 (1958); 7 Wigmore, op. cit. supra, §2241.

19/ Comment, 17 U. of Chicago L. Rev. 525, 530 (1950).

"When it is realized that the trust reposed in the marriage relation is elsewhere unequaled, it is seen why our morals are intolerant of a wife's testimony against her husband. Betrayal of this trust (and it is a small matter whether broken by testimony as to 'confidential communications' or noncommunicative acts learned by virtue of the relation) is indeed morally reprehensible. The law, too, is a moral force and what it sanctions it raises in value. The institution of marriage is most basic to society. By privileging its essential trust, the law approves the marriage relation. And it is not true that the law of evidence has no existence outside of the courts . . . for of all rules, at least this one - that a woman may not testify against her husband - is part of the public's understanding."

Congress, by the enactment of what is now D. C. Code §14-306, has not legislatively abolished the privilege. The Supreme Court has recently recognized the existence and present merit of the privilege in all federal court prosecutions. Hawkins v. United States, 358 U.S. 74 (1958). This Court should not handicap the essential validity of that privilege by allowing the instant conviction to stand.

IV. If the conviction is not reversed, the case should be remanded to the trial court for a hearing on appellant's motion to vacate judgment.

On June 26, 1958, appellant filed with the trial court a motion to vacate the judgment of conviction, pursuant to 28 U.S.C. §2255. In that motion, he alleged that the complaining witness, Clara Gardner, had originally told the police that appellant had never molested her. At that point, the motion asserted, a policeman took Clara Lee aside and told her she would be put in a foster home unless she was willing to accuse appellant of taking indecent liberties with her. It was only then, according to the allegation, that the complainant first told the story she related on the witness stand. Appellant claimed this allegation could be corroborated by a doctor at Gallinger Hospital who examined Clara Gardner on the night the alleged offense occurred and was then told by her that she had not been molested. (J. A. pp. 35-37). On August 18, 1958, the trial judge denied this motion without hearing. (J. A. p. 39).

This denial was erroneous. The circumstances related in the motion are sufficient to make out a charge of knowing use of perjured testimony by the prosecution. This is true even though appellant made no accusation that the U.S. Attorney who prosecuted the case knew of the witness' coerced perjury. The indictment was brought and the trial conducted, in part at least, on the basis of the investigation and reports of the policemen with first-hand knowledge of the case against appellant. For these purposes, they must be considered to be a part of the "prosecution." Any threats by one of these policemen which compelled the complainant to testify falsely should void the conviction. Unless this charge was contradicted by the record before the trial court, a hearing should have been held on it. Taylor v. United States, 229 F. 2d 826 (8th Cir. 1956); James v. United States, 175 F. 2d 769 (5th Cir. 1949).

Examination of the record now before this Court (including the trial transcript not available to the judge below when he denied the motion) reveals nothing to contradict appellant's allegation. The only reference to the assertions in the motion occurs in appellant's own testimony. (J. A. p. 27). And that testimony was only that the complainant did not claim to be molested until after the policeman spoke with her. Appellant specifically stated at the trial he did not know what was said to the child; therefore, he did not realize she had been coerced to testify falsely until after the trial.

This testimony cannot be considered sufficient to excuse the trial judge from his statutory duty to hold a hearing. In light of the fact that nothing else in the record precludes a charge of coerced falsification, denial of the motion without hearing was erroneous. If the conviction is not invalidated, the case should be remanded with directions that a hearing be held on this allegation.

CONCLUSION

For the foregoing reasons, the conviction below cannot stand. The judgment should accordingly be reversed. If this be not done, the case should be remanded for a hearing on petitioner's allegation that the prosecution knowingly used perjured testimony.

Respectfully submitted,

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BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,102

HENRY WILSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

OLIVER GASCH,
United States Attorney.

CARL W. BELCHER,
FRANK Q. NEBEKER,
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United States Court of Appeals
For the
District of Columbia Circuit

FILED JUN 11 1959

Joseph W. Stewart
CLERK

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1. Is motion of appellant, which he filed as a motion under Title 28, Section 2255 of United States Code, properly to be construed as a notice of direct appeal?

2. Does the supervisory power of the Court extend to the creation *en toto*, of a direct appeal where a direct appeal had never been sought by the parties?

3. Whether there was sufficient evidence upon which to predicate a verdict of guilty, when the appellant was placed at the scene shortly before and after the offense, dressed substantially as described by the complainant, and under circumstances which corroborated the testimony of the complainant that the appellant had committed an indecent act upon her while she was alone with him in the bedroom.

4. Whether, in the absence of any requested instructions from the appellant's trial counsel, the trial judge properly instructed the jury.

5. Whether Congress has not completely abrogated the Common Law rule of bi-lateral privilege against spouse-testimony, except as to confidential communications.

6. In any event, in a prosecution where the husband is charged with committing an indecent act upon his wife's sister's daughter, who has been sleeping in the same bed with the husband and wife for some time prior to the date of the offense, was not the wife properly permitted to testify against her husband under the theory that she was an injured spouse?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,102

HENRY WILSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF PROCEEDINGS

By an indictment filed on December 16, 1957, the appellant was charged in one count with violation of Title 22, D.C. Code, Section 3501(a), indecent act upon a child. Trial was had on February 4, 1958, before a jury which returned a verdict of guilty on the same day. Appellant was adjudged guilty and sentenced to serve a prison term of from one to four years, on April 17, 1958. Counsel was present and represented the appellant at all stages of the proceedings. No appeal was noted. On April 23, 1958, appellant *pro se* filed a motion to vacate and set aside sentence and appoint other capable counsel. Apparently it was filed pursuant to Title 28, U.S. Code, Section 2255. Therein appellant alleges *inter alia* a denial of effective assistance of counsel. The trial judge denied this motion on April 30, 1958, noting that the "motion, files and records conclusively show that the petitioner is entitled to no relief." (J.A. pp. 34-35).

A second *pro se* motion under Section 2255 was filed on June 26, 1958. Therein the issue of effectiveness of counsel was raised as follows:

"Defendant states that he was ineffectively represented by counsel, defendant had been drinking heavily on the day of the alleged offense. Defendant informed counsel of all facts, but counsel failed to explore a defense."

The "defense" referred to apparently relates to the credibility of the testimony of the complaining witness. This motion was styled "Motion to vacate sentence and discharge defendant, or, in the alternative, grant a new trial." This motion was denied without hearing on August 18, 1958. (J.A. pp. 35-39.)

Appellant *pro se* filed a petition in this Court seeking to appeal the trial court's judgment of denial of the June 26, 1958 motion. No appeal has been taken from the April 30, 1958 denial of the first motion. This Court, on December 9, 1958, ordered the petition to be held in abeyance and counsel was appointed to file a memorandum in support thereof. That order stated: "Counsel is requested to include in the memorandum comment directed to whether petitioner is before this Court on direct appeal from the judgment of conviction as well as matter regarding the attempt to appeal from the denial of petitioner's motion to vacate sentence." The memorandum in support of the petition was filed in this Court on March 23, 1959. The memorandum urged that this Court has jurisdiction to entertain a direct appeal from the judgment of conviction of April 17, 1958, and from the trial court's denial on August 18, 1958, of appellant's motion under Section 2255, filed June 26, 1958.

By order of this Court dated April 20, 1959, appellant was "allowed to proceed on appeal without prepayment of costs from the judgments of the District Court entered April 17, 1958 and August 18, 1958." The record on appeal was filed in this Court on April 29, 1959.

COUNTERSTATEMENT OF EVIDENCE

Clara Lee Gardner was called as the government's first witness. She was eleven years of age. After the trial court determined her competency to testify she testified that she lived with her aunt, *Alice Wilson*, and her uncle, the appellant, at 1744 Hobart Street, N.W., and was presently sleeping in her own bed in a bedroom which she had shared with her aunt and uncle, (J.A. p. 8), but on and before the day of the offense she had slept in common bed with her aunt and uncle. (J.A. pp. 22-23.) She testified that on the night in question, November 14, 1957, her uncle came home around 10:00 o'clock, and told her and her aunt to get in bed. (J.A. pp. 8-9.) He then told the aunt to go downstairs and get some coffee, which she did.

While her aunt was gone Clara Lee got in her uncle's bed where he was, and he told her to take off her pants. When she did, he got on top of her and started to working his body up and down for what she thought was a long time. Her aunt returned to the bedroom, gave the appellant the coffee and left the room for the stated purpose of turning off the coffee pot. (J.A. 10-11.) Clara Lee testified that at the time he was wearing his undershirt and shorts. She further testified that her uncle had previously done this to her around four times, and that he had threatened to kill her if she told anyone. (J.A. p. 12.) On cross-examination she testified that her uncle had been drinking that night but that he didn't have too much. (J.A. p. 12.)

Alice Wilson, the appellant's wife, was then called to testify. She refused to testify against her husband. (J.A. p. 13.)

The government next called Officer *Grisby B. Southcomb* of the Tenth Precinct. He testified that about 11:40 P.M. on November 14, 1957, he went to the Hobart Street address and in the bedroom found the appellant dressed only in his undershirt, underpants and socks. There in the bedroom he also saw the complainant, dressed

in a slip. At the time she was straightening out the bed covers. (J.A. p. 14.)

Officer Southcomb further testified that he had arrested many drunk persons during his sixteen years on the police force and that in his opinion the defendant was not intoxicated at 11:40 P.M. The defendant had a slight odor of alcohol on his breath, but he needed no assistance in dressing, his speech was not slurred, and he did not stagger as he walked downstairs.

The government stipulated that there was no penetration and that the complainant's hymen was intact. At this point the government rested its case and counsel moved for a judgment of acquittal, *inter alia*, on the ground that the evidence failed to show the requisite intent and insufficiency of the evidence. The motion was denied. (J.A. p. 18.)

The defendant proceeded to call *Charles Wilson*, who testified that he and the defendant had been drinking together from 5:30 P.M. to 8:30 P.M. on the evening in question, and that the defendant left in his car about 9:00 o'clock in an intoxicated condition. (J.A. pp. 19-20.) Charles Wilson also testified that he did not know whether the defendant was drunk when he got home. (J.A. p. 21.)

The appellant testified that he had been drinking from sometime after 12:00 o'clock noon until he went to a friend's house; that thereafter they drank together until he left, and it was at this point that he remembered nothing further until he saw two officers standing in the door of his bedroom, and heard one say "were you fooling with that child". (J.A. pp. 24-25.) The appellant further testified that at this time he was still drunk. (J.A. p. 25.) The appellant also testified that Clara Lee Gardner was the daughter of his wife's sister.

The appellant went on to deny any action or intention toward the child and further testified that the child remained silent when first asked in the presence of appellant what the appellant had done to her. That it was only after the child walked back into another room where

his wife went also that the child returned and swore that appellant had done something to her. (J.A. pp. 26-27.)

The appellant then rested and the government informed the court that it had one witness in rebuttal. At this point defense counsel stated: "I object", to which the court replied: "She doesn't want to testify." The government replied: "She states now she does, Your Honor, in rebuttal to the defendant's testimony." The court replied: "It will only have to be in rebuttal, it can't be direct testimony. Do you now want to testify?" Mrs. Wilson replied that he did and the court allowed the government to proceed. (J.A. p. 28.)¹

Mrs. Wilson then testified that when the appellant came home on the night of November 14, 1957, she smelled a little alcohol on his breath, and that he was pretty liquored up, but he wasn't drunk; that he was able to walk and talk without difficulty. (J.A. p. 28.)²

STATUTES AND RULES INVOLVED

Title 28, United States Code, Section 2255 provides:

Federal custody: remedies on motion attacking sentence.—A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be

¹ No further objection to Mrs. Wilson's testimony was made by counsel after the issue of her willingness to testify was cleared up (J.A. p. 28.)

² No motion for a judgment of acquittal was made at the close of the case. (J.A. p. 29.)

served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Title 22 District of Columbia, Section 3501(a) provides:

Any person who shall take, or attempt to take any immoral, improper or indecent liberties with any child of either sex, under the age of sixteen years with the intent of arousing, appealing to, or gratifying the lust or passion or sexual desires, either of such person or of such child, or of both such person and such child . . . shall be imprisoned in a penitentiary, not more than ten years.

Title 14, District of Columbia Code, Section 306 provides:

In both civil and criminal proceedings, husband and wife shall be competent but not compellable to testify for or against each other.

Title 14, District of Columbia Code, Section 307 provides:

Confidential communications between husband and wife.—In neither civil nor criminal proceedings shall a husband or his wife be competent to testify as to any confidential communications made by one to the other during the marriage.

Federal Rules of Criminal Procedure, Rule 30 provides:

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Federal Rules of Criminal Procedure, Rule 37(a)(2) provides in pertinent part:

Time for Taking Appeal.—An appeal by a defendant may be taken within 10 days after entry of the judgment or order appeal from, . . .

SUMMARY OF ARGUMENT

The denial of appellant's motion to vacate sentence was proper in light of the fact that the stated grounds upon which such motion was predicated are insufficient for relief. Moreover, such motion is a second or successive motion and the facts relied upon were available to appellant even before trial.

This Court is without jurisdiction to entertain a direct appeal in this case because appellant's motion of April 23, 1958, under Title 28 U.S.C., Section 2255 is not the

legal equivalent to a notice of appeal, and no such notice of appeal has been filed within the proper time.

Alternatively, there was sufficient evidence upon which the verdict of guilty could be predicated; the charge to the jury was adequate and proper, and the record fails to reflect any request for additional instructions; and the trial court was correct in allowing the wife of the appellant to testify, since the Common Law rule precluding adverse spouse testimony has been abrogated by statute, and notwithstanding this, the wife was an injured spouse and thus competent to testify over objection.

ARGUMENT

I

Appellant Is Not Entitled To A Hearing On His Motion To Vacate Sentence

Appellant has now shifted his position, in connection with this aspect of his case, from effectiveness of counsel to knowing use of perjured testimony. As respects his former position, the government maintains its view as expressed in its opposition to motion for leave to appeal in forma pauperis. The allegations of ineffectiveness of counsel fall short of the specificity required to necessitate a hearing under *Mitchell v. United States*, — U.S. App. D.C. —, 259 F.2d 789 (1958). According to appellant's own motion to vacate sentence, filed June 26, 1958, he advised his counsel "of all facts" concerning the credibility of his accuser's testimony.³ With such knowledge his counsel acted "in matters normally within the realm of counsel's judgment" and hence appellant is not entitled to a post trial hearing. See *Mitchell v. United States*, *supra*, and *Offutt v. United States*, 100 U.S. App. D.C. 80, 242 F.2d 373 (1957), a case involving counsel's failure to call certain witnesses and ask questions of witnesses presented.

³ J.A. p. 37.

Moreover the trial court was correct in denying appellant's second motion without a hearing because "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner", Title 28 U.S.C., Section 2255, where the facts alleged in the second motion could have been raised in the earlier one. *Turner v. United States*, — U.S. App. D.C. —, 258 F.2d 165 (1958). In *Turner* this Court qualified this holding to instances where the petitioner had no justifiable reason for his failure to assert the facts earlier, or unless he was unaware of the significance of relevant facts.⁴ In the instant case appellant obviously was aware at the time of trial and before of the facts alleged in his motions and of their significance, for as he states, he informed counsel of all the facts.

The case of *Taylor v. United States*, 229 F.2d 826 (8th Cir. 1956), upon which appellant now relies becomes dispositive of this issue. That case holds that where the motion of the appellant shows that he had full knowledge that perjured testimony would be given at the trial, he may not wait to collaterally attack his conviction on this basis. Accord: *Green v. United States*, 256 F.2d 483 (8th Cir. 1958). See also *Smith v. United States*, 88 U.S. App. D.C. 80, 187 F.2d 192 (1950).

II

Appellant Is Not Entitled To A Direct Appeal

The government recognizes the presence in this record on appeal of this Court's order of April 20, 1959, allowing the appellant to proceed on appeal from the judgments of the District Court entered April 17, 1958, and August 18, 1958. Nevertheless, the government again earnestly urges upon this Court the proposition that no direct appeal jurisdiction exists where an appellant seeks to collaterally attack his conviction and sentence by a

⁴ Citing *Price v. Johnston*, 334 U.S. 266 (1948) and *Wong Doo v. United States*, 265 U.S. 239 (1924), habeas corpus cases.

motion styled under Title 28 U.S.C., Section 2255, then after denial of this motion, again seeks to attack collaterally his conviction and sentence under Section 2255, each time on substantially the same ground, *viz*, ineffectiveness of counsel. It should be observed that appellant's second motion under Section 2255 clearly evidences his choice of collateral attack rather than direct appeal. Recognizing, however, that appellant filed these motions *pro se* and hence is not chargeable with the skill of a trained lawyer, we are still left with the fact that appellant's present counsel seeks to avail himself of the benefits of collateral attack under the second motion, while using the first motion as a vehicle for direct appeal. This is clearly an inconsistent position, for one cannot collaterally attack a judgment and at the same time, using the same type of pleading, perfect an appeal on the merits. The latter must wait for a disposition of the former.

We know of no precedent, and appellant cites none, in which a Section 2255 motion to vacate sentence was treated as a petition for leave to appeal directly from a judgment of conviction, or as notice to so appeal under Rule 37(a) (2) F.R. Cr. P. Appellant urges this Court to extend the principal of *Jordan v. United States*, 98 U.S. App. D.C. 160, 233 F.2d 362, *reversed on other grounds*, 352 U.S. 904 (1956) to include the filing of a motion under Section 2255.⁵ However, the *Jordan* case, *supra*, is distinguishable from the instant case. There *Jordan* filed with the Court of Appeals a pleading sounding in mandamus to compel the trial court to grant him a hearing on his motion under Section 2255. This Court considered the mandamus pleading as an attempt to have the trial court's action reviewed. This pleading was the second step taken by the appellant. The case at bar then falls short of the *Jordan* case, for here we have only the first step, i.e. the filing of the motion under 2255, with no timely attempt to have its denial reviewed.

⁵ Appellant's Memorandum In Support Of Petition For Leave To Appeal In Forma Pauperis and his Reply Of Petitioner.

Appellant argues that the advantages of direct appeal over collateral attack are so great that he ought to be afforded the former unless there is an intelligent and competent waiver. Such a rule would equate every motion under 2255, of which there is an abundance, to a direct appeal. Moreover, to rule that appellant's initial motion is sufficient to be a notice of appeal would virtually do away with the distinctions long recognized between pleadings. Such a holding is tantamount to saying that any communication to the court by a prisoner, in the form of an objection to imprisonment is a notice of appeal. Certainly it is fair to assume that any prisoner will object to his incarceration and avail himself of any means to regain his freedom. That is, of course, why prisons are guarded.

Direct appeal is not the whole and collateral attack one of its parts, for the latter often lies where the former has no place. In *Kinney v. United States*, 177 F.2d 895 (10th Cir. 1949) the court held:

"The purpose of the motion under said section (2255) is not to 'review the proceedings of the trial as upon appeal or writ of error, but merely to test their validity when judged upon the face of the record or by constitutional standards'". (Citing cases).

And in *United States v. Walker*, 197 F.2d 287 (2d Cir. 1952), where the appellant on a 2255 motion challenged the use of evidence at trial, which evidence was alleged to have been illegally obtained, the court held:

"Such a motion cannot ordinarily be used in lieu of appeal to correct errors committed in the course of a trial, even though such errors relate to constitutional rights".⁶

⁶ See also *Howell v. United States*, 179 F.2d 213 (6th Cir. 1949), cert. den., 337 U.S. 906; *Davilman v. United States*, 180 F.2d 284 (6th Cir. 1950); *Barnes v. Hunter*, 188 F.2d 86 (10th Cir. 1951), cert. denied, 342 U.S. 920 (1952); *Kreuter v. United States*, 201 F.2d 33 (10th Cir. 1952); *Pelley v. United States*, 214 F.2d 597 (7th Cir. 1954), cert. denied, 348 U.S. 915 (1955).

In *West v. United States*, 94 U.S. App. D.C. 46, 222 F.2d 774 (1954) and in *Gerringer v. United States*, 93 U.S. App. D.C. 403, 213 F.2d 346 (1954), where the "legal equivalent" test was applied, and in other cases relied upon by the appellant,⁷ it is interesting to note that the pleadings filed were by the substance of their terms consistent with direct appeal, and more important gave of no interpretation inconsistent with direct appeal. In the instant case such an inconsistent interpretation is not only possible but unavoidable. It should therefore appear that a motion under Section 2255 should not be construed as a legal equivalent to a notice of appeal. *Smith v. United States*, — U.S. App. D.C. —, — F.2d —, (No. 14867, decided June 4, 1959).

III

The Issues Sought To Be Presented On Direct Appeal Are Resolved In Favor Of The Government

A. *The trial court need not have directed a judgment of acquittal.*

Appellant attempts to avail himself of this point when it was not preserved on appeal. No motion for a judgment of acquittal was made at the close of the trial. Since appellant put on a defense, and failed to renew his motion he is foreclosed from seeking appellate review on the point there raised. *Hall v. United States*, 83 U.S. App. D.C. 166, 168 F.2d 161, *cert. denied*, 344 U.S. 853 (1948). Relief, however, may be granted only in the rare case of "manifest error or serious injustice," *Battle v. United States*, 92 U.S. App. D.C. 220, 221, 206 F.2d 440, 441 (1953) but certainly none is reflected in the record.

⁷ See Appellant's Memorandum In Support Of Petition For Leave To Appeal In Forma Pauperis, pp. 5 and 6.

B. *There was sufficient evidence upon which a verdict of guilty could be predicated.*

It is not necessary for this Court to decide appellant's contention that corroboration of the complainant's testimony is requisite for conviction in the instant case.⁸ For even under the authority relied upon by him at page 9 of his brief the record in this case reflects adequate corroborative testimony. The type of corroboration, if any is needed, is not corroboration of the corpus delicti or of identity of the accused as such⁹ or of the specific intent required,¹⁰ but rather as to time, place and circumstances. Certainly corroboration is found in the testimony of the appellant himself. He places himself in the bedroom at the time the police arrived. In addition he testified that they had been sleeping in a common bed for three months or better prior to the night in question.¹¹ This coupled with the complainant's testimony that the appellant had committed similar acts on her before,¹² adds credence to her testimony.

The testimony of the arresting officer supplies further corroboration. He arrived at the scene at 11:40 P.M. Appellant argues that his knowledge of the case is lim-

⁸ Appellant cites no authority for the proposition that corroboration, which is required in certain types of sexual offenses, is required in a prosecution under Section 3501(a). It is interesting to note that in *Benton v. United States*, 88 U.S. App. 158, 188 F.2d 625 (1951), a case very similar to this case on its facts, this Court observed: "Thus it is seen that the testimony upon which the conviction rests came from the child and was denied by the accused." Though this case was reversed and remanded for reasons not here pertinent this Court did say that "The trial court thought that the child had testified truthfully and denied the motion for a new trial. Ordinarily we would not disturb the action of the trial court on such a motion."

⁹ Appellant's Memorandum In Support Of Petition For Leave To Appeal In Forma Pauperis, p. 8.

¹⁰ Appellant's brief, p. 15.

¹¹ J.A. p. 24.

¹² J.A. pp. 11-12.

ited to some two hours after the offense.¹³ Time alone, however, should not be the test. The substance of the officer's testimony lends credence. He found the appellant in the bedroom, on the bed, and dressed substantially as the child had described, and the child was there in her under clothing straightening out the bed covers. This certainly is adequate corroboration under the test in *Kelly v. United States*, 90 U.S. App. D.C. 125, 194 F.2d 150 (1952), and *Walker v. United States*, 96 U.S. App. DC. 148, 223 F.2d 613 (1955).

Assuming, *arguendo*, that the lack of corroborating testimony placing the appellant at the scene at the time of the offense rather than shortly thereafter is fatal, we still have in the record the testimony of Alice Wilson that her husband came home at 10:00 P.M., shortly before the commission of the offense. Thus it is seen that the appellant was placed at the scene both before and after the perpetration of his crime of privacy, under circumstances lending support to the testimony of the only other eye witness, the young girl. Apropos is the language in *Kelly, supra*, wherein this Court said:

"Probably only rarely is the offense committed in the presence of a third person, and rarely is the verbal invitation corroborated by some proven circumstance which establishes that the invitation has actually been made we counsel that the trial courts require corroboration of the circumstances surrounding the parties at the time, such as presence at the alleged time and place and similar provable circumstances.

¹³ The complainant was watching television and getting ready to take a bath. The appellant told his wife and the young child to get into the bed. He then sent his wife downstairs to get coffee. While the young girl removed some of her clothing, the appellant kept telling her to get in bed. (J.A. pp. 9-10.) The appellant also had to remove his clothing. Of necessity then the officer arrived considerably less than an hour and forty minutes after the commission of the offense.

C. The court's instructions to the jury were proper

Appellant urges further that if there was sufficient evidence presented, the conviction must be reversed for failure of the court to charge the jury that they must believe the corroborative testimony before they can return a verdict of guilty. The record fails to reflect a request by appellant's trial counsel for such an instruction. Therefore under Rule 30, F.R.Cr.P., *Villaroman v. United States*, 87 U.S. App. D.C. 240, 184 F.2d 216 (1950), and *Benator v. United States*, 209 F.2d 734 (9th Cir. 1954), cert. denied, 347 U.S. 974, appellant cannot now complain. *Smith v. United States, Supra*, p. 12.

Moreover, such an instruction is not required under the law of cases requiring corroborative testimony. Appellant's own authority¹⁴ stands for the proposition that the trial court must determine whether there is corroborative testimony; the weight and sufficiency of such evidence falls within the prerogative of the jury.

IV

There Was No Error In Allowing Appellant's Wife To Testify

Appellant's contention of error in this sphere is without merit. His trial counsel failed to make an appropriate objection. It is clear from a reading of the conversation which took place before the wife testified that when appellant's counsel stated his objection to the wife testifying on rebuttal, he did so for the reason that he thought she was being forced to testify. When the prosecuting attorney informed the court that the appellant's wife was willing to testify, no further objection was made, and it would seem that such have been done.

If further and more specific objection had been made, or if the objection made were held to be sufficient, the

¹⁴ *State v. Mueller*, 202 Iowa 1067, 208 N.W. 360 (1926); *People v. Randall*, 133 Mich. 516, 95 N.E. 551 (1903); *Cofer v. State*, 163 Ga. 878, 137 S.E. 378 (1927).

testimony was still competent and admissible. To arrive at this conclusion one may approach the problem from one of two directions.

Title 14 D.C.C., Section 306 provides that in civil or criminal cases spouses are competent but not compellable to testify for or against each other. Initially at Common Law parties in interest to civil or criminal trials were incompetent witnesses. Since the husband and wife were considered as one this incompetency extended to the witness-spouse. See generally Wigmore 3rd Ed. 1940, Section 2227, *et seq.* In view of the District of Columbia statute it would appear that the Common Law rule has been abrogated by Congress in this jurisdiction. The Supreme Court in the recent case of *Hawkins v. United States*, 358 U.S. 74, 78 (1958) recognized that such a change could be brought about by legislation, judicial decision, or rule making power. It might then be argued that the statute changed only the rule as to competency and left unchanged the rule of bilateral privilege which under *Hawkins, supra*, would require consent of the defendant-spouse. This theory falls when the statute is read in light of the canon of statutory construction that "significance and effect should, if possible without destroying the sense or effect of the law, be accorded every part of the act, including every section, paragraph, sentence, clause, phrase, and word." 50 Am. Jur., Section 358; Generally 50 Am. Jur., Sections 357-362. To hold that Section 306, *supra*, leaves unchanged the rule that one spouse could not testify against the other in a criminal case without the latter's consent, would render meaningless the word "against" and do violence to half of the purpose obviously intended by Congress. It is anomalous to assume that a defendant spouse would allow damaging testimony to be elicited from the other spouse if by a mere objection he could prevent it.

Moreover, it is interesting to note that Section 306, *supra*, remains unchanged since its adoption in 1901.¹⁵ At

¹⁵ Act of March 3, 1901, 31 Stat. 1358, Ch. 854, Sec. 1068.

that time, as was noted in the legislative history of the Act (House Report 1017, Volume 4024, 56th Congress 2d Session) the provisions were adopted from the laws of neighboring states, particularly Maryland. In Maryland, by the Act of 1864, Section 3, spouses were not competent or compellable to testify for or against each other. This was basically the Common Law rule. By the Act of 1876, Ch. 357, the civil side of this rule was changed and by the Act of 1888, Ch. 545 the criminal side also was changed. Thus by 1888 Maryland law on this point was the same as that adopted in the District of Columbia in 1901.¹⁶ Cf. Title 49 D.C.C., Section 301, where the Common Law is in force in the District of Columbia when not inconsistent with subsequent legislation of Congress. It might also be observed that Wigmore takes note that the old Common Law privilege has been abolished by this latest Maryland statute. See Wigmore 3rd Ed. 1940, Sec. 2245(b), footnote 10.

In addition it is pointed out in Wigmore that the use of the term "incompetent" in stating the rule is indiscriminating and inaccurate in that the actual concept underlying the exclusion of such testimony was not one of absolute disqualification, such as in the case of the early incompetency of one spouse to testify for the other, but simply one of marital privilege, which could be asserted by either and to which the court was required to give effect unless waived by both. Wigmore 3rd Ed., 1940, Sec. 2227, *supra*. Many cases which have dealt with the problem spouse-testimony cite Wigmore with approval on this point. *Stein v. Bowman*, 38 U.S. 207 (1839); *Wyatt v. United States*, 263 F.2d 304 (5th Cir. 1959).

It would therefore appear that the testimony of Alice Wilson against her husband was admissible under the theory of Congressional abrogation of the Common Law. This is not to say that the Common Law has been entirely

¹⁶ In 1906 the Maryland Courts adopted the rule that a wife could testify against her husband over his objection in a bigamy prosecution. *Richardson v. State*, 103 Md. 112, 63 A. 317 (1906).

changed in this field. Congress obviously intended to retain one portion of the old rule, for in Section 307 of Title 14, D.C.C., a spouse is still rendered incompetent to testify concerning any confidential communication. This section likewise has remained unchanged since its adoption in 1901.

Alternatively, the government's position, assuming the continued existence of the Common Law privilege in the defendant-spouse, is that the testimony of the wife is admissible under the theory that she is an injured spouse. Beginning with *Stein v. Bowman, supra*, the rule was that the defendant-spouse could not preclude testimony of the witness-spouse where the latter was injured by direct violence.¹⁷ See also Lord Audley's trial, 3 How. St. Tr. 401 (1631) where the accused had his servants rape his wife and stood by giving commands.

That this rule has been broadened to include other crimes the effect of which is adverse to the witness spouse or to the marital status is beyond question.¹⁸ Cannot this

¹⁷ Appellant relies upon the holding in *Hawkins v. United States, supra*, to support the exclusion of the testimony of the witness spouse. However, neither in the Tenth Circuit's opinion in *Hawkins*, 249 F.2d 735, nor the Supreme Court's opinion viewed the witness spouse as being injured. *Hawkins* was tried under the Mann Act, 18 U.S.C. 2421, for transporting a girl, not his wife, from Arkansas to Oklahoma to work as a prostitute for a woman who turned out to be *Hawkins'* wife. But see: *Wyatt v. United States, supra*, where the woman so transported was the wife of the accused, and hence the injured spouse.

¹⁸ *Wyatt v. United States, supra*; *Ryno v. United States*, 232 F.2d 581 (9th Cir. 1956), 130 F. Supp. 685 (S.D. Cal. 1955) (forgery of wife's allotment check by husband—held a wife a "victim" of the crime); *United States v. Leach*, 7 USCMA 388, 22 CMR 178 (1956) (adultery by husband); *Herman v. United States*, 220 F.2d 219 (4th Cir. 1955) (Larceny from the wife); *United States v. Graham*, 87 F. Supp. 237 (E.D. Mich. 1949), (transporting in interstate commerce money stolen, converted or taken by fraud from wife); *Shores v. United States*, 174 F.2d 838 (8th Cir. 1949) (Mann Act where wife was victim); *O'Loughlin v. People*, 90 Colo. 368, 10 P.2d 543 (1932), (murder of daughter); *Wilkinson v. People*, 86 Colo. 406, 282 P.2d 257 (1929) (rape of wife's daughter); *Cohen v. United States*, 214 Fed. 23

reasoning then be applied to the crime of committing an indecent act upon a minor, and particularly when the child is that of the witness-spouse's own sister. Who can argue that such an offense is not an outrage upon nature in its cleanest and tenderest relations, as well as a crime against humanity, and constitutes a crime committed by one spouse against the other. *Wilkinson v. People*, 86 Colo. 406, 282 P. 257 (1929).

CONCLUSION

Wherefore, it is respectfully submitted that the District Court action in denying appellant's motion filed June 26, 1958, under Section 2255 of Title 28, U.S.C., be affirmed, and that appellant's direct appeal from the judgment of April 17, 1958, be dismissed, or in the alternative that such judgment be affirmed.

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(9th Cir. 1914) (Mann Act type case under White Slave Act); *Richardson v. State*, Op. Cit., *supra*, N. 1 p. 4 (bigamy); See also: *Manual For Courts-Martial, United States*, 1951 p. 277; paragraph 148e.